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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 MARK I. SOKOLOW, et al.,

4 Plaintiffs,

5 v.

04 CV 397 (GBD)

6 PALESTINE LIBERATION  
7 ORGANIZATION, et al.,

8 Defendants.

9 New York, N.Y.  
10 February 17, 2015  
10:00 a.m.

11 Before:

12 HON. GEORGE B. DANIELS,

13 District Judge

14 APPEARANCES

15 ARNOLD & PORTER LLP  
16 Attorneys for Plaintiffs

17 BY: KENT A. YALOWITZ  
18 PHILIP W. HORTON  
19 TAL MACHNES  
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BY: MARK J. ROCHON  
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MICHAEL SATIN  
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(Trial resumed; jury not present)

THE COURT: Good morning.

As you have already been notified, one of our jurors was stuck in Connecticut and called this morning at about 8, 8:30 and said, she I believe, could not get down here today. So I notified as quickly as possible all of the other jurors we will adjourn until tomorrow.

Let's use the time productively though. I have read all the letters. Let me first address the issue of what we have planned for tomorrow.

Mr. Rochon, let me start with you. Who do you intend to call at this point? How long is it going to take, and basically what is going to be the subject of that testimony?

MR. ROCHON: I expect to call two or three -- I am going to make the decision on the third actually during the examinations because there are two witnesses that relate to potentially the Wafa Idris bombing.

The first witness will be Amneh Reehan, the woman that wrote that letter. The second witness will be General Abu Yaman, who is one of the witnesses disclosed all along, and he was a GIS officer who was responsible for directing the arrest of Hashaika and eventually assisting in the transfer of Hashaika from where he was arrested to Ramallah. He will not be testifying that he saw the man escape or that the man escaped. He is of the view that he did escape, but he can't

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1 testify to that from actual knowledge.

2 THE COURT: So what is he going testify to?

3 MR. ROCHON: The first part of that, that the PA  
4 directed his arrest, wanted his arrest, and there was never a  
5 direction that he be released. And that goes as to the PA's  
6 position as to this person Hashaika.

7 THE COURT: Remind me -- go ahead.

8 MR. ROCHON: The plaintiffs claim that Abdel Karim  
9 Aweis got him from the jail, along with Nasser Shawish, the two  
10 of them, and they have been arrested together in a town called  
11 Tulkarm. And from my client's standpoint, we wanted to  
12 establish that he was in fact arrested, that the PA wanted him  
13 in custody. He has an official position. That is this guy's  
14 job.

15 THE COURT: So he arrested this individual?

16 MR. ROCHON: He directed the arrest of this  
17 individual. He was a more senior person. He also helped to  
18 coordinate the transfer, and the transfer of this individual  
19 person from Tulkarm to Ramallah was done in coordination with  
20 the United States.

21 THE COURT: Was he on the Zinni list?

22 MR. ROCHON: No, not that I know of.

23 Put it this way, no one says he was.

24 THE COURT: He wasn't on the list that we saw.

25 So I am just trying to make sure I understand the

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1 limits and the scope of his testimony.

2 So he is going to say that he directed that he be  
3 arrested. And he is going to say he did that why?

4 MR. ROCHON: Because they received information that he  
5 was going to be engaged in an attack. That information, I  
6 believe, was provided by the Israelis to the Palestinians.

7 THE COURT: He was arrested when?

8 MR. ROCHON: February 10 or 11.

9 THE COURT: Of?

10 MR. ROCHON: 2002.

11 THE COURT: So he was arrested. Remind me, which  
12 incident?

13 MR. ROCHON: The incident in which he did commit a  
14 suicide attack was March 21.

15 THE COURT: So he is going to say that the Israelis  
16 told him to arrest him. He gave the order to arrest that  
17 individual. That individual was arrested in about February of  
18 2002.

19 MR. ROCHON: Yes.

20 THE COURT: What else does he have to say?

21 MR. ROCHON: Then the decision was made that he should  
22 be held in Ramallah instead of in Tulkarm because it was more  
23 secure. They coordinated the transfer of him from Tulkarm to  
24 Ramallah.

25 THE COURT: When?

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1 MR. ROCHON: That would have been February --

2 THE COURT: Still in February.

3 MR. ROCHON: Yes.

4 THE COURT: Days after his initial arrest.

5 MR. ROCHON: Not long after his initial arrest.

6 THE COURT: Do you know the date of his arrest?

7 MR. ROCHON: The 10th is the arrest.

8 THE COURT: He was transferred on what date?

9 MR. ROCHON: Shortly thereafter.

10 THE COURT: Within that week? Three or four days or  
11 three or four weeks?

12 MR. ROCHON: Closer to three or four days. The  
13 witness doesn't have a specific date to give us, but not three  
14 or four weeks.

15 THE COURT: So the person arrested was suspected of  
16 being a terrorist bomber, intending to carry out a terrorist  
17 attack. He was arrested in February and then he was  
18 transferred to Ramallah.

19 What else does he have to say?

20 MR. ROCHON: He assisted and coordinated, because they  
21 needed Americans to assist, so he was transferred in an armed  
22 convoy. It was actually a convoy with the United States in the  
23 front and rear car, Palestinians in the middle. The reason is  
24 because they were going through areas in which no Palestinian  
25 security officials could have a weapon and they wanted the

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1 transfer --

2 THE COURT: He was transferred to the Mukataa?

3 MR. ROCHON: Yes, and placed into a cell there in the  
4 military intelligence section.

5 THE COURT: What else does he have to say after that?

6 MR. ROCHON: That's the gist of his testimony as to  
7 Hashaika.

8 THE COURT: Does he have any knowledge about how  
9 Hashaika got out of prison weeks before the terrorist attack?

10 MR. ROCHON: He is not able to say that he got out  
11 weeks before. In fact, your Honor, I don't believe that's the  
12 case. He can't specify when he got out.

13 THE COURT: He definitely got before March 21.

14 MR. ROCHON: Exactly.

15 THE COURT: He got out weeks before.

16 MR. ROCHON: I don't know if it was weeks or days.  
17 He is not going to offer testimony as to when he got  
18 out.

19 THE COURT: He has no testimony to offer as to when or  
20 how he got out?

21 MR. ROCHON: He has nothing that I would consider to  
22 be admissible testimony that I could present as to how he got  
23 out. He has a view, but the rules evidence would not allow it.

24 THE COURT: His view is as good as yours.

25 MR. ROCHON: Probably a little better than mine, but

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1 not good enough.

2 THE COURT: Not admissible evidence. He has no  
3 firsthand knowledge of how this guy walked out of prison or  
4 escaped. Ran, walked, crawled, however he got out of prison.

5 MR. ROCHON: I can't offer him for that.

6 That's about 13 minutes of testimony.

7 THE COURT: Do you have any problems with any of that,  
8 Mr. Yalowitz?

9 MR. YALOWITZ: Yes, I do.

10 THE COURT: What is your problem?

11 MR. YALOWITZ: Number one, I don't know what it means  
12 to say he directed or coordinated. If the guy --

13 THE COURT: He gave the order.

14 MR. YALOWITZ: That's what you said. I didn't hear  
15 Rochon say that.

16 THE COURT: If he is not going to say that, then he is  
17 not going to testify.

18 MR. ROCHON: I believe I said he directed the arrest.

19 MR. YALOWITZ: I don't know what that means.

20 THE COURT: I assume he gave the order.

21 MR. ROCHON: Yes.

22 MR. YALOWITZ: Is that what that means?

23 THE COURT: He just said yes.

24 MR. YALOWITZ: He kind of mumbled it. I didn't hear  
25 it.

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1 THE COURT: Yes is the answer.

2 MR. YALOWITZ: All right. That's the first thing.

3 The second thing is, this business about they couldn't  
4 go through certain areas because Palestinians weren't allowed  
5 to have guns. That's clearly outside the bounds. It's not  
6 relevant.

7 THE COURT: I agree with you. I am going to keep that  
8 out.

9 MR. YALOWITZ: This is the problem I have with these  
10 defendants and their witnesses.

11 THE COURT: Tell me substantively what your problem  
12 is.

13 MR. YALOWITZ: I said it and you have said you're  
14 going to keep it out. I believe you. I don't believe them.

15 THE COURT: Anything else?

16 MR. YALOWITZ: Yes.

17 THE COURT: If he wants to say that they arrested him  
18 with the assistance of the U.S. government and they had a  
19 convoy that went and took him to Ramallah, I have no problem  
20 with that.

21 MR. YALOWITZ: I don't have a problem with that.

22 I am very, very concerned that we are going to have a  
23 witness who tries to slip in hearsay.

24 THE COURT: He will not. I am directing he not. It's  
25 not going to happen.

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1           Mr. Rochon, you are going to instruct him that he is  
2 not supposed to make any comment with regard to his opinion  
3 about how this guy got out of prison.

4           Is that the issue you're worried about?

5           MR. YALOWITZ: That is one issue I am worried about.  
6 The other is I heard Rochon say there was never an order to  
7 release Hashaika. How can that guy possibly know that?

8           THE COURT: He can say he never gave an order to  
9 release Hashaika. I don't know if that's what he is going to  
10 testify to. You're right, he can't testify that an order was  
11 never given. If they want to elicit that, he can say he never  
12 gave an order to release.

13           Quite frankly, as I think it out, if he has no idea  
14 how he got out, I don't know why it's relevant that he didn't  
15 give an order to release him.

16           MR. YALOWITZ: I agree with that.

17           THE COURT: Mr. Rochon, did you intend to offer that  
18 testimony?

19           MR. ROCHON: Yes. I feel like plaintiffs are doing a  
20 heck of job of stripping away everything that we might put in.

21           Now, this witness directed his arrest. He did not  
22 give an order he be released. He is a senior person in  
23 Ramallah. He is unaware of any order to direct his release.

24           THE COURT: The fact that he unaware of it is  
25 irrelevant. You're not aware of it. I'm not aware of it. We

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1 don't know how he got out. It doesn't make it more or less  
2 likely that he got out based on someone else's assistance or  
3 direction.

4 MR. ROCHON: As a senior person in that particular  
5 region, his lack of awareness of that is relevant.

6 It's one thing to say, does it prove conclusively no  
7 order was given? No. But is it relevant that he is unaware of  
8 any such order? Of course it is relevant.

9 THE COURT: It's only relevant that he never gave such  
10 an order. If he never gave such an order, maybe it's relevant.  
11 I don't know why it's relevant at all since you're not calling  
12 him for any circumstantial or direct evidence as to how he was  
13 released.

14 If you're trying to imply that he must have escaped  
15 because this person didn't give the order to release him, I  
16 don't think that's admissible.

17 MR. ROCHON: As long as the plaintiffs aren't going to  
18 argue it was within Abdullah Karim Aweis's scope of  
19 authority --

20 MR. YALOWITZ: Of course it was.

21 MR. ROCHON: Let me finish, Mr. Yalowitz.

22 As long as they are not going to argue that, then I  
23 don't need to put in what my witness understood to be the  
24 authority.

25 THE COURT: I didn't understand that.

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1 MR. ROCHON: They are going to claim Abdel Karim Aweis  
2 got him out.

3 THE COURT: Your witness doesn't know whether or not  
4 Aweis got him out, right?

5 MR. ROCHON: Right.

6 THE COURT: That's the end of that discussion. He  
7 doesn't know whether that's true or not.

8 MR. ROCHON: Judge, here is the argument.

9 You and Mr. Yalowitz are focusing on whether this guy  
10 is going to say he escaped. This testimony is relevant as to  
11 whether or not, if Mr. Aweis did that, whether it was within  
12 his scope of authority as an employee of the PA. And in that  
13 vein, it's important that I should be able to establish what  
14 this individual's mental state was as to whether any such  
15 release was authorized.

16 THE COURT: How would he know that?

17 MR. ROCHON: Because he is one step down in the GIS,  
18 and GIS --

19 THE COURT: He doesn't know whether his boss gave the  
20 order. He doesn't know whether Arafat gave the order. He  
21 doesn't know whether someone below him, above someone else gave  
22 the order. All he can say is he didn't give the order.

23 MR. ROCHON: It is relevant as to whether or not an  
24 order was given, whether or not this man ever was aware of such  
25 an order.

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1 THE COURT: Why? Who cares if he is aware of the  
2 order. He either knows or he didn't know.

3 MR. ROCHON: Because in the course of his duties, if  
4 there had been such an order, it's the kind of thing he should  
5 have been told about.

6 THE COURT: Unless they didn't want him to know.

7 MR. ROCHON: The question of whether or not it is  
8 conclusive proof is different than whether it's relevant to  
9 show an issue in dispute, which is whether or not Abdel Karim  
10 Aweis acted within his authority if in fact he got him out as  
11 they claim.

12 THE COURT: The fact is, when he comes here to tell us  
13 what he is unaware of is not a proper subject of his testimony.  
14 He can tell us what he is aware of. He is not the only person.  
15 No one is arguing that it was his act that constituted the  
16 scope of employment.

17 Unless he or someone else has some direct evidence to  
18 give as to how this person got out of prison, the fact that he  
19 doesn't have a clue about how he got out of prison, first of  
20 all, that's a little inconsistent that he would have known if  
21 somebody had given the order. If he had gotten out anyway, he  
22 should have known how he got out. He should have some  
23 information.

24 MR. ROCHON: He has a clue.

25 THE COURT: What basis does he have? Did someone

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1 inform him how this guy got out?

2 MR. ROCHON: No. You said he doesn't have a clue. He  
3 actually has a clue.

4 THE COURT: A clue means he knows. He doesn't know,  
5 right?

6 MR. ROCHON: He has no admissible evidence.

7 THE COURT: He doesn't know.

8 MR. ROCHON: As you and I would use the word know, he  
9 does not know.

10 THE COURT: As he would use the word know, he would  
11 say, I don't know.

12 MR. ROCHON: Based on custom and practice, he would  
13 have a view. I am not going to seek to elicit it.

14 THE COURT: If he is asked, do you know how this  
15 person got out of prison, he would answer, no, I do not.

16 MR. ROCHON: If you phrased the question to say, do  
17 you know of your own person knowledge --

18 THE COURT: I didn't say that. If I ask him, do you  
19 know how this person got out of prison, he would say I do not.

20 MR. ROCHON: That would be the best answer you could  
21 give. Most human beings in that position, given what he knows,  
22 he actually believes he escaped.

23 THE COURT: How does he believe he got out? What does  
24 he believe happened that constituted his release from prison?

25 MR. ROCHON: They received warnings from -- I am not

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1 seeking to elicit this. But every time you ask me what he in  
2 fact believes, Mr. Yalowitz thinks I am trying to get that into  
3 evidence.

4 THE COURT: It's not coming into evidence. You're  
5 saying it's relevant somehow to his state of mind and you keep  
6 saying he has a clue and I want to know what that clue is.

7 What does he think happened?

8 MR. ROCHON: He believes that when the Israelis called  
9 to warn that there was going to a bombing of the Mukataa, the  
10 men who were guarding the military intelligence prison, like  
11 others in Mukataa, vacated it.

12 THE COURT: Did they unlock all the doors so the  
13 prisoners can get out?

14 MR. ROCHON: Therefore, the security was such that  
15 they could get out.

16 THE COURT: What does that mean? Just because the  
17 guards left the prison -- I could be a guard at Rikers Island.  
18 If I decide that somebody says there is a bomb threat and I run  
19 out and I decide I'm not going to stick around, all the  
20 prisoners don't get to walk out. Someone has to release them  
21 too.

22 MR. ROCHON: In other prisons when they were blown up,  
23 prisoners and officers died and --

24 THE COURT: I am asking you, how does he think -- not  
25 how the guards got out -- how does he think the prisoners got

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1 out?

2 MR. ROCHON: He thinks at that point the security was  
3 such that prisoners could get out.

4 THE COURT: How?

5 MR. ROCHON: Your view of the prison and mine --

6 THE COURT: I am just asking you.

7 I am just asking you, tell me physically how he  
8 believed the prisoners got out of prison. He thinks everybody  
9 got out?

10 MR. ROCHON: Yeah, I think everybody did get out.

11 THE COURT: How does he think that was effectuated?

12 MR. ROCHON: Either when the bombing happened that  
13 destroyed the prison or before.

14 THE COURT: Or before?

15 MR. ROCHON: Yes.

16 THE COURT: How would it have happened before?

17 MR. ROCHON: A guard may have unlocked doors so  
18 prisoners wouldn't have got killed. That wouldn't be a  
19 release.

20 THE COURT: That would be a release. I am just  
21 saying, I don't understand your argument. That is a release.  
22 If you want to argue they released him for another reason,  
23 that's different. That is a release. If they open the door  
24 and say, you know it's dangerous here, we don't think you  
25 should stick around, go home, that's a release. Right?

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1 MR. ROCHON: I am not arguing to get that into  
2 evidence. The only reason we are talking about this is I  
3 mentioned that he does in fact have what he considers to be a  
4 clue as to how they got out. I am not going to be putting that  
5 into evidence.

6 What I am arguing for is that the witness who directed  
7 the arrest should be allowed to say that he is unaware of any  
8 order that they be released.

9 THE COURT: What you just gave me of how he thought  
10 they got out is inconsistent with that position, that he was  
11 unaware of any order to release them. You just said the way he  
12 thinks they got out is because the place was going to be  
13 bombed. The people gave an order that all the guards should  
14 leave and somehow before the prison was bombed somebody let  
15 them out.

16 MR. ROCHON: I am only trying to put in some of the  
17 evidence. I can tell you what the guy thinks happened.

18 The Israelis first hit on Mukataa was at a specific  
19 place, a fuel plant. When they hit that fuel plant there was  
20 some damage to the prison as well. He believes that is when  
21 people got out.

22 THE COURT: He believes they blew the wall open and  
23 they just walked out.

24 MR. ROCHON: I am not trying to get this into  
25 evidence.

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1 THE COURT: You are trying to get it in. If you want  
2 to abandon your proffer of his opinion or his knowledge about  
3 whether somebody else gave the order, then we don't have to  
4 have that discussion. I am giving you an opportunity to  
5 convince me that he has some basis on which to say that it's  
6 more likely than not that nobody gave an order to release this  
7 guy days or weeks before he committed a suicide bomb.

8 MR. ROCHON: The only way a member of a law  
9 enforcement organization can say he is unaware of an order is  
10 to bring in every person --

11 THE COURT: I never said that. You don't have to  
12 argue that. I am trying to figure out what the basis is for  
13 his knowledge and how is it relevant and how does it make it  
14 more likely than not that he didn't give the order and he  
15 wasn't there when somebody else gave the order.

16 MR. ROCHON: He didn't give such an order. He is the  
17 number two man in this organization. He believes that his boss  
18 did not give an order.

19 THE COURT: Why does he believe that?

20 MR. ROCHON: Because his boss is the one who told him  
21 to make sure these guys get arrested.

22 THE COURT: So?

23 MR. ROCHON: That is evidence that his boss wished for  
24 them to be arrested. That's inconsistent with that he wished  
25 for them to be released.

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1 THE COURT: No. Clearly people have been arrested and  
2 released according to the plaintiffs. They say that's the MO.

3 MR. ROCHON: They say that, but I don't have to accept  
4 it.

5 THE COURT: No, you don't. You have to give me some  
6 facts that dispute that.

7 What is the fact that he is going to testify to that  
8 disputes that? He has no more basis than you to even know  
9 whether or not somebody else gave the order.

10 MR. ROCHON: I would say to the court that your  
11 questions to me I think are better for Mr. Yalowitz's cross  
12 than as a basis to exclude from the evidence altogether this  
13 witness's statement that he is unaware of any order directing  
14 this person be released, given that he knows he didn't, and he  
15 was the number two guy there, and he was in daily communication  
16 with the number one guy, and the number one guy, who is Tawfiq  
17 Tirawi. Plaintiffs have said things about him, but we don't  
18 have to accept them.

19 Tawfiq Tirawi is the one who told him to make sure  
20 these people were arrested, that directed him to contact  
21 Tulkarm and ensure their arrest. Therefore, it would be  
22 inconsistent with wanting the person out, to have arrested  
23 them, and then move them to a more --

24 THE COURT: Mr. Rochon, the problem I have -- and I  
25 think this is your burden, not theirs -- the problem that I

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1 have with all of your arguments that you have made with regard  
2 to whether he was released, or whether or not any of these  
3 people were released, or whether they escaped, is you are in  
4 the best position to call someone and tell us how these people  
5 got out of prison. You have decided not to do so, not to take  
6 on that burden. So I am asking you all of these questions, and  
7 these aren't magical questions. They are not trick questions.

8 I am asking you, look, your people, they controlled  
9 the prison. All you have to do is give me a proffer about what  
10 you say is the true fact about how they got out of prison. You  
11 have declined to do so. But you want to imply that there is  
12 some basis to conclude that they got out innocently. I can't  
13 let you just hide behind the fact that you don't want to tell  
14 us how they got out of prison because you know. Your people  
15 know. They know one way or the other. Just tell me how they  
16 got out. You keep dancing around this issue.

17 MR. ROCHON: I can't find the guards who were in the  
18 prison.

19 THE COURT: You can tell me what the official position  
20 is, chapter and verse, about how these people got out of jail.  
21 You do not have that. Your people have not told you that, or  
22 if they have told you that, it is something you have decided to  
23 decline to tell me.

24 I don't know how these people got out of prison. Your  
25 people know how these people got out of prison. This is the

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1     guy you say is number two in the GIS and he doesn't know how  
2     they got out of prison?

3             MR. ROCHON: Judge, because he wasn't at the prison  
4     when they got out. The only evidence you are letting me put in  
5     is an --

6             THE COURT: I am letting you put in any person that  
7     was at the prison when they were released, any person that was  
8     there the day before, any person that can give me some facts  
9     back up your theory of these people must have escaped. That's  
10    the only thing that you have proffered.

11            You have a theory that they must have escaped. You  
12    have no witness who is willing to come into this courthouse who  
13    is an employee of the defendant who will say they escaped on  
14    Tuesday because the building was bombed. I was there on  
15    Monday. They were locked up. I showed up on Wednesday and the  
16    building fell down and the walls collapsed and everybody was  
17    missing. You have proffered no substantive evidence about how  
18    they got out, which is a basis for me to conclude that, one,  
19    either you don't want me to tell, which I don't conclude, or  
20    your people are incapable of telling me. So if they are  
21    incapable of telling me, I am not going to let them come in  
22    here and imply that they know something that they don't.

23            You have brought nobody in this case at all during  
24    this trial to say how any individual who was locked up by the  
25    PA or the PLO got out of jail. Not a single fact. Not a

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1 single witness who could testify as to either, direct or  
2 hearsay evidence, as to how it is they got out.

3 What am I supposed to do with that? I am supposed to  
4 let you have people just keep saying we didn't release them, we  
5 don't think anybody else released them, we think they must have  
6 escaped?

7 MR. ROCHON: If you let me put in hearsay evidence, I  
8 would have had it.

9 THE COURT: You're not entitled to hearsay evidence.  
10 You have direct evidence. You could have asked that. As a  
11 matter of fact, I asked you what the hearsay evidence is and  
12 you have not to this day told me how any particular person got  
13 out of prison even based on hearsay.

14 MR. ROCHON: You have asked me --

15 THE COURT: I asked you how did they get out.

16 MR. ROCHON: I have a view of how they got out.

17 THE COURT: I don't want your view. I want a fact. I  
18 want somebody to say, you know what, even if it's hearsay, this  
19 person can say, I am most concerned about this. I showed up  
20 the next day and I said, where are all the prisoners? That's  
21 what I would expect. And then somebody would have said to him,  
22 I'm sorry, general or colonel or whatever his title is, I'm  
23 sorry, those people escaped yesterday.

24 You're saying he is so concerned about arresting him  
25 and transporting him to a more secure facility. The day after

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1 they are all missing, he doesn't have a clue how they got out.  
2 Doesn't have a report from anybody, written or oral, as to the  
3 details of how these people left the prison. There is no  
4 person that you have alluded to that had direct or  
5 circumstantial evidence and can tell us how these people left  
6 the prison.

7 So he can come and he can testify about how he made  
8 the arrest and how he delivered these people to the prison and  
9 the last thing he saw was that they were locked up in the  
10 prison. If he wants to testify, and I am not even sure why he  
11 should go there, but if he wants to testify that he didn't  
12 personally give an order to release them, he can testify to  
13 that. He cannot testify about his knowledge or lack of  
14 knowledge about whether or not anyone else gave an order to  
15 release him.

16 That's my ruling.

17 MR. ROCHON: I understand the court's ruling. The  
18 court's questions and comments as to whether there is a factual  
19 basis for our belief that they escaped --

20 THE COURT: I asked you what is the factual basis.

21 MR. ROCHON: We have talked to many people who have  
22 given us reports that they escaped.

23 THE COURT: How did they escape? That's a very simple  
24 question.

25 MR. ROCHON: What we have been told by others is the

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1 jail was destroyed and that's how these guys got out. I don't  
2 have the witness to present on that.

3 THE COURT: They didn't get out all on the same day.

4 MR. ROCHON: These two did.

5 THE COURT: You have made the same argument.

6 MR. ROCHON: Barghouti wasn't in the same prison.

7 THE COURT: That's the point. His prison wasn't  
8 destroyed. So that's not the argument for how he got out.

9 You have got nobody who said, I heard that this is  
10 exactly -- what is the fact about what you heard, hearsay or  
11 otherwise, about how Barghouti got out?

12 MR. ROCHON: We have heard the same thing, that there  
13 was a destruction of the jail.

14 THE COURT: That means what? That means the jail was  
15 bombed and the walls were destroyed and so they just walked out  
16 of the prison. That is what your belief is.

17 MR. ROCHON: That's our understanding. I don't have  
18 an eyewitness on it, your Honor.

19 THE COURT: You don't have any report, even a hearsay  
20 report, to anybody?

21 Mr. Rochon.

22 MR. ROCHON: On Hashaika we do have a report. It's in  
23 evidence.

24 THE COURT: Not as to the details of how he got out of  
25 the prison.

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1 MR. ROCHON: As to the fact of the escape.

2 THE COURT: Think about it. You're telling me how  
3 important it is to make sure these people were in a secure  
4 facility. These people are just missing the next day. You're  
5 saying there is no investigation, there is no written report,  
6 there is no I spoke to this guard and this guard said. There  
7 is absolutely nothing that indicates how it is that they  
8 escaped except this one reference. I can't even say that.  
9 There is absolutely no written or oral statement by anyone or  
10 received by anyone as to how they got out other than they must  
11 have escaped.

12 MR. ROCHON: As to Barghouti, I proffered to you that  
13 there was an investigation.

14 THE COURT: How was it determined that Barghouti got  
15 out?

16 MR. ROCHON: That he had escaped.

17 THE COURT: How?

18 MR. ROCHON: I wasn't allowed to put it in.

19 THE COURT: Tell me. I am asking you to tell me that.

20 MR. ROCHON: Destruction of the facility.

21 THE COURT: How does that facilitate his release?

22 MR. ROCHON: It wasn't secure anymore.

23 THE COURT: What does that mean? The lock was broken?  
24 The walls fell down? Did all the other prisoners escape at the  
25 same time? What does that mean?

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1 MR. ROCHON: Judge, what it means is this. During  
2 that period of time, as you have heard, jails were being  
3 bombed, prisons were being bombed.

4 THE COURT: You don't have to go back through that.  
5 That doesn't tell me the details of how this individual left  
6 the prison or how any individual left the prison. You want to  
7 give me a general, oh, well, anybody that you figured out that  
8 we arrested and was in prison is no longer in prison, it's  
9 because they escaped when the building was blown up. That's  
10 all you have given me.

11 MR. ROCHON: As to these two individuals, which are  
12 the only ones in question in this case --

13 THE COURT: Are these the only two individuals that  
14 escaped when the building was bombed?

15 MR. ROCHON: We haven't conducted a factual  
16 investigation as to others.

17 THE COURT: You didn't ask anybody that?

18 MR. ROCHON: It hasn't been our focus. It is 13 years  
19 ago.

20 THE COURT: So?

21 MR. ROCHON: It will a little hard to find --

22 THE COURT: So are all of these facts you're trying to  
23 give the jury 13 years ago.

24 MR. ROCHON: I am just saying when the court suggests  
25 that the absence of a witness to corroborate what others

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1 understand to be the case --

2 THE COURT: It's not an absence of corroboration; it  
3 is an absence of any explanation about how they escaped during  
4 bombings of the prisons.

5 MR. ROCHON: Somehow I have ended up telling you that  
6 I am not trying to put on a witness to say that he escaped.

7 THE COURT: You said you want him to say he is not  
8 aware of anyone giving an order to release him so that the jury  
9 can imply and infer that he must have escaped. It has no other  
10 relevance, does it?

11 MR. ROCHON: It goes as to whether or not if Abdel  
12 Karim Aweis, who was subordinate to this individual, got him  
13 out, it was not with authority. They want to argue it was  
14 within the scope of his authority when he got him out. They  
15 want to argue that. It is relevant to his scope of authority,  
16 the fact that this individual is unaware of any such order.  
17 That doesn't infer escape or not escape. But it does go to  
18 scope of authority. To prohibit us from putting that on allows  
19 the plaintiff to argue that was within the scope of authority  
20 and limits us --

21 THE COURT: This guy cannot say that an order was not  
22 given by this person and he cannot say that that order wasn't  
23 within the scope of his authority.

24 MR. ROCHON: I am not going to say --

25 THE COURT: He can't say that.

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1 MR. ROCHON: But he can say, but you won't let me.

2 THE COURT: Every witness you want to call can say, I  
3 am unaware of any order releasing this guy from prison. You  
4 had the head of GIS here.

5 MR. ROCHON: Yes. He wasn't head of GIS at the time.

6 THE COURT: He wasn't head of GIS either.

7 MR. ROCHON: He was the person who coordinated the  
8 arrest of the individual, the placement of where he was  
9 located.

10 THE COURT: Did he head up any investigation as to how  
11 this person got out of prison?

12 MR. ROCHON: No, sir.

13 THE COURT: OK. That issue is set aside. He can't  
14 testify that he is unaware that somebody else gave the order.  
15 You have another issue on that witness?

16 MR. YALOWITZ: Yes, I do. I have a big issue about  
17 closing with all of this. Mr. Rochon just stood here and he  
18 looked you in the eye and lied to you.

19 MR. ROCHON: You know, Judge --

20 THE COURT: That blows past me, Mr. Rochon. You know  
21 that.

22 MR. YALOWITZ: He put on a witness Faraj who said  
23 there was only one jail that was destroyed. That was the sworn  
24 testimony of his witness, Faraj. He put on a witness Ashrawi  
25 who said that the Mukataa prison was bombed at the end of March

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1 or later 2002. So that's not when Hashaika got out of jail.  
2 Hashaika was already dead by then. Then he put on a witness  
3 Shehadeh, who said the preventive security, which is where  
4 Abdullah Barghouti was held, that building was bombed in April  
5 of 2002, and Abdullah Barghouti was released in August of 2001.

6 So if he is willing to look you in the eye -- I will  
7 be more polite -- and bullshit you, then what is he going to do  
8 with the jury talking about all of the prisons were destroyed?

9 THE COURT: Mr. Yalowitz, I am going to put a stop to  
10 this. Don't use that kind of language to describe anything  
11 that's going on in this case. Have a seat.

12 Mr. Rochon, your third witness, let's assume your  
13 third witness is going to testify, what is this third witness  
14 going to testify to?

15 MR. ROCHON: He is the one who filled out the Wafa  
16 Idris martyr file. He is actually the person who filled out  
17 the file. He doesn't know if somebody filled it out.

18 THE COURT: He is going to testify to what?

19 MR. ROCHON: As to the basis for the language in the  
20 file. In the file there is language that the plaintiffs have  
21 alluded to that characterizes the operation and he would  
22 explain why he wrote that.

23 THE COURT: What is he going to explain?

24 MR. ROCHON: That's how it was referred to in the  
25 public media and that was his source of the information.

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1 THE COURT: What facts are you focused on?

2 MR. ROCHON: Wafa Idris.

3 THE COURT: What was the issue?

4 MR. ROCHON: In the recommendation portion of the  
5 file, plaintiffs have focused on a statement that -- I will get  
6 the exact language -- that she died in a heroic martyrdom  
7 operation. That's in his handwriting. I would like to ask him  
8 where did you get that information.

9 THE COURT: What is he going to say? That wasn't his  
10 conclusion?

11 MR. ROCHON: That was how it was referred to in the  
12 media.

13 THE COURT: He wrote that based on the reference in  
14 the media.

15 MR. ROCHON: He would explain, when you have a  
16 situation like that, they have no evidence of what happened  
17 other than the family coming in, because they don't have a  
18 body, they don't have a death certificate. All they have is  
19 really what the family says or public information and that's  
20 why he wrote that letter.

21 THE COURT: At most, we will have two to three  
22 witnesses by the defense tomorrow.

23 MR. ROCHON: Yes. Total testimony I think an hour, 15  
24 minutes, unless the cross is very long, which hopefully, given  
25 how tailored I have tried to make my direct, should not be an

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1 opportunity to get into the entire case and say, what do you  
2 think about this, that and the other thing? Because I think  
3 what is sauce for the goose should be sauce for the gander.

4 THE COURT: It usually is in this courtroom. Neither  
5 one of you has been happy with any of my rulings.

6 Mr. Yalowitz, after the defense rests, first of all,  
7 you want to offer Exhibit 1281? Is that the primary purpose of  
8 this rebuttal?

9 MR. YALOWITZ: No, that's not the primary rebuttal.

10 Remind me, 1281 is?

11 THE COURT: 1987 designation.

12 MR. YALOWITZ: That's definitely not the primary  
13 purpose.

14 THE COURT: Are you intending to attempt to offer that  
15 in evidence?

16 MR. YALOWITZ: We are considering offering that in  
17 evidence.

18 THE COURT: You can forget that.

19 MR. YALOWITZ: Fine.

20 THE COURT: There is already testimony in this case  
21 that during the relevant time period the PLO was not considered  
22 to be a terrorist organization designated by the United States  
23 or the Secretary of State. That's the relevant time period.  
24 1987 is a whole different ball game.

25 MR. YALOWITZ: Let's move on.

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1 THE COURT: I am not so sure what you want to call the  
2 rebuttal witness to say. What is he rebutting?

3 MR. YALOWITZ: For example, we heard testimony that  
4 Tirawi is a free man today, and there is an implication that  
5 Shrenzel was incomplete in his description of what was going on  
6 with Tirawi during cross. I want to clean that up.

7 THE COURT: What do you say it was implied that  
8 Shrenzel did or didn't?

9 MR. YALOWITZ: Shrenzel said Tirawi was not indicted  
10 or tried or convicted because the Israeli authorities did not  
11 catch him.

12 THE COURT: Right.

13 MR. YALOWITZ: The implication from the Faraj  
14 testimony was he was easy to catch. There was no problem. And  
15 therefore Shrenzel must have been lying. That's the  
16 implication.

17 THE COURT: He doesn't have to be lying. He just  
18 doesn't have to be correct.

19 MR. YALOWITZ: Or he wasn't correct.

20 So Shrenzel can explain that answer. He is going to  
21 say that Tirawi was in the Mukataa under the protection of  
22 Arafat. And then there was a change in policy toward Tirawi.

23 THE COURT: By whom?

24 MR. YALOWITZ: By the Israeli authorities.

25 THE COURT: If anything, that's what contradicts him,

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1 not the other testimony. He didn't say that he wasn't arrested  
2 because there was a change in policy by the Israelis. He said  
3 he wasn't arrested because they couldn't find him.

4 MR. YALOWITZ: He said they didn't catch him.

5 THE COURT: Let me take your words. They didn't  
6 arrest him because -- they didn't catch him. I think you would  
7 agree that the reasonable import of his testimony was that he  
8 was not arrested because they couldn't find him and they  
9 couldn't arrest him. That's what he said.

10 MR. YALOWITZ: They knew exactly where he was.

11 THE COURT: But he had an opportunity to say that  
12 ultimately the real reason he wasn't arrested was because the  
13 Israelis made a decision not to arrest him.

14 MR. YALOWITZ: Right.

15 THE COURT: But he never said that.

16 MR. YALOWITZ: He can say that now.

17 THE COURT: Shouldn't he have said that while he was a  
18 witness on direct, redirect or cross? How does that rebut  
19 something that happened on the defense case?

20 MR. YALOWITZ: Because the defense says he is a free  
21 man today.

22 THE COURT: Isn't that true?

23 MR. YALOWITZ: I think it is true.

24 THE COURT: And he is a free man because the Israelis  
25 don't want him.

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1 MR. YALOWITZ: I think that's true.

2 THE COURT: But he is not a free man because they  
3 can't find him or they can't arrest him.

4 MR. YALOWITZ: Right.

5 I think he should be allowed to give a moment of  
6 testimony --

7 THE COURT: What is he going to say about why he  
8 didn't testify to that as the reason this person was not  
9 arrested?

10 MR. YALOWITZ: Because I didn't ask him.

11 THE COURT: He was asked. He was asked, why didn't  
12 they arrest him and he said that they couldn't find him.

13 MR. YALOWITZ: I don't think he said that.

14 THE COURT: That's what he meant.

15 MR. YALOWITZ: I don't think that's what he meant.

16 THE COURT: What did he mean?

17 MR. YALOWITZ: I believe what he meant was they chose  
18 not to capture him.

19 THE COURT: That's not what he said. Do you have his  
20 transcript page you can reference me to?

21 MR. YALOWITZ: We can look it up. We looked at it  
22 over the weekend.

23 THE COURT: That's clearly not my recollection.

24 MR. YALOWITZ: He said capture.

25 THE COURT: He clearly gave the jury the impression

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1 that they were unable, not unwilling, but unable to arrest him.

2 MR. YALOWITZ: Let's look at it.

3 THE COURT: Does anybody have that page?

4 MR. HILL: 1588.

5 MR. ROCHON: That is one of the references. Also  
6 1514, he said: Because he was not in the hands of the Israeli  
7 authorities, that's the only reason. Were he captured by the  
8 Israelis, as we really like to do, he would have been indicted.

9 Later he said that he was one of the most wanted  
10 terror operatives by Israel. He was not captured by Israel and  
11 was not put to justice.

12 THE COURT: The first part is what I remember. What  
13 was the first part again?

14 MR. ROCHON: 1514, your Honor.

15 THE COURT: Let me just take a look. I don't have a  
16 strong opinion.

17 MR. YALOWITZ: What happened was Mr. Rochon takes what  
18 he says and kind of shifts it a little bit and leaves you, and  
19 perhaps the jury, with a misimpression.

20 THE COURT: If it was a misimpression, it was given by  
21 Shrenzel, inadvertently or deliberately, because he did not say  
22 that they decided they no longer wanted him for any crime.  
23 That would have been the natural answer to that question,  
24 wouldn't it?

25 MR. YALOWITZ: There are two fact points that I think

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1 should be cleared up based on the testimony of Faraj and the  
2 questions of Faraj about could have been captured.

3 Point number one, the Israeli authorities did not  
4 capture Tirawi because they didn't want to break into the  
5 Mukataa or Arafat was protecting Tirawi, number one.

6 Number two --

7 THE COURT: Where does he get that from?

8 MR. YALOWITZ: That I can't tell you what his basis  
9 for it is off the top of my head.

10 THE COURT: That's a fact. That's not an opinion.

11 MR. YALOWITZ: That's a fact.

12 THE COURT: I assume he wasn't there personally.  
13 Where does he get that fact from?

14 MR. YALOWITZ: I have to ask him.

15 THE COURT: You better ask him because he is not going  
16 to testify because that's what he wants to say.

17 What is the second?

18 MR. YALOWITZ: Fact number two is that the Israeli  
19 government had a change in policy and decided no longer to  
20 pursue Tirawi.

21 THE COURT: OK. He is going to say the reason why he  
22 is not today in prison, the reason why he was never indicted  
23 ultimately is because they decided not to indict.

24 MR. YALOWITZ: Correct.

25 THE COURT: But that's not the answer he gave.

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1 MR. YALOWITZ: I think it's consistent with the answer  
2 he gave, which is they didn't catch him.

3 THE COURT: No. Mr. Yalowitz, you're giving me lawyer  
4 speak now. This is common sense.

5 The guy was asked, you asked the guy correctly, what  
6 happened to this guy? And somebody asked him more than once,  
7 why didn't they ever arrest this guy? And he said because they  
8 couldn't capture him. That's all he said.

9 MR. YALOWITZ: He didn't say they couldn't capture  
10 him.

11 He said they didn't capture him. Unfortunately,  
12 that's an ambiguous answer.

13 THE COURT: The direct, truthful answer would have  
14 been that because they ultimately decided they didn't want him.  
15 He never volunteered that. He never cleared that up.

16 Look, I don't need to debate this point with you.  
17 Quite frankly, if you want to call him for that purpose and  
18 subject him to further cross-examination on that issue, I guess  
19 they would welcome that.

20 Is there anything else other than trying to clear up  
21 the misconception that you say that they have created on their  
22 case that somehow he was not arrested because the Israelis  
23 didn't want him?

24 MR. YALOWITZ: Yes. There are a couple of other  
25 things.

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1 THE COURT: What else?

2 MR. YALOWITZ: The relationship between the defendants  
3 and Hamas, which Faraj testified about that it was a terrible,  
4 hateful relationship.

5 THE COURT: What is he going to say that he didn't  
6 already say?

7 MR. YALOWITZ: He is going to say that this guy  
8 Yassin, the guy with the picture being kissed, wasn't a  
9 spiritual leader, wasn't about to die, which is the impression  
10 that the defendants left, that he was actually an important  
11 Hamas guy.

12 THE COURT: We know he was an important Hamas guy.  
13 How does he know he wasn't about to die?

14 MR. YALOWITZ: Because he didn't die in 2004.

15 THE COURT: When was this kiss supposedly?

16 MR. YALOWITZ: Before he died.

17 THE COURT: How much longer before?

18 MR. YALOWITZ: I can't say.

19 THE COURT: I don't want to waste a lot of the jurors'  
20 time. He is going to rebut their statement that he was going  
21 to die.

22 MR. YALOWITZ: He is going to rebut the impression  
23 left with the jury that there was a hostile relationship  
24 between Hamas and the PA.

25 THE COURT: He is going to rebut that by saying what?

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1 MR. YALOWITZ: Number one, he is going to comment on  
2 it briefly.

3 THE COURT: What is he going to say?

4 MR. YALOWITZ: He is going to say that they had a  
5 cooperative relationship during the Intifada.

6 THE COURT: Which means what?

7 MR. YALOWITZ: Which means they did operations  
8 together.

9 THE COURT: What does that mean?

10 MR. YALOWITZ: They planned suicide operations and  
11 conducted suicide operations together.

12 THE COURT: What is he basing that on, that they  
13 planned suicide operations together?

14 MR. YALOWITZ: He has done the research of looking up  
15 many suicide operations.

16 THE COURT: Is that in his expert report?

17 MR. YALOWITZ: I don't believe it is, no.

18 THE COURT: On what basis does he have the right to  
19 give that expert opinion at this point in this trial?

20 MR. YALOWITZ: I think it's fair ground for rebuttal.

21 THE COURT: Why?

22 MR. YALOWITZ: Because the defendants, unexpectedly in  
23 my view, said that they have a hostile relationship.

24 THE COURT: What did you expect them to say?

25 MR. YALOWITZ: I expected them to focus on the 2000 to

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1 2004 period and not start in with 2007 and later periods  
2 which --

3 THE COURT: You want him to rebut the relationship in  
4 2007?

5 MR. YALOWITZ: I want him to come back to 2004.

6 THE COURT: Hasn't he already said that?

7 MR. YALOWITZ: Eviatar said it.

8 THE COURT: Somebody said it.

9 MR. YALOWITZ: The other thing I want him for, and  
10 really it's just a moment or two, I want him to foundationalize  
11 that video of Muhammad Dahlan saying we protected Hamas. We  
12 talked about that video. I want him to set the foundation for  
13 him.

14 THE COURT: Why is that video now admissible?

15 MR. YALOWITZ: The video is of Dahlan. This is  
16 Exhibit 217, which we looked at. This is Dahlan during a  
17 period when he is an employee of the defendants.

18 THE COURT: What period of time is that?

19 MR. YALOWITZ: Like 2001.

20 THE COURT: And he said what?

21 MR. YALOWITZ: He said we protected Hamas. That  
22 rebuts the testimony of Faraj that they didn't cooperate with  
23 Hamas.

24 THE COURT: Didn't cooperate with Hamas on what?

25 My understanding was, and the reason I excluded the

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1 video, is because the video was not commenting on what you want  
2 to use it for. The video was saying, look, we are the order in  
3 the West Bank and our responsibility is to protect all of the  
4 citizens of the West Bank and certain individuals who  
5 are -- there are two types of individuals. There are certain  
6 individuals who Israelis tell us to arrest, and we do the  
7 arrests, or as you say, we don't do the arrests. We arrest  
8 them and let them go. But there are certain other individuals  
9 that the Israelis have targeted for assassination. It is our  
10 responsibility to protect everyone in the West Bank from  
11 assassination.

12 That is not part of the deal. So yes, we have the  
13 responsibility to protect the lives of the people in Hamas,  
14 just as we have the responsibility to protect the lives of  
15 other Palestinians. And if the Israeli government wants to  
16 arrest these people, then they should arrest these people. But  
17 they can't blow up their houses with them and their families in  
18 it because we have a responsibility to protect all of the  
19 Palestinians. That was my reading of the statement out of  
20 context.

21 You still want to use that to imply that they were  
22 saying that they were planning terrorist attacks together?

23 MR. YALOWITZ: I must be -- maybe I am misremembering  
24 this one, your Honor.

25 THE COURT: Maybe I am misremembering it. I thought

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1 it was a video.

2 MR. YALOWITZ: This is one we showed the witness  
3 outside the presence of the jury because we thought it was  
4 inconsistent with his testimony which was that they were trying  
5 to arrest people from Hamas. His testimony was our job was to  
6 arrest all the Hamas guys. Then this wasn't his direct boss  
7 but it was the guy in Gaza who had the parallel title. I  
8 thought we showed it to him on the theory that if he had seen  
9 it, it would come in because it was inconsistent with his  
10 testimony.

11 THE COURT: Do we have it? Can we take a quick look  
12 at it. If it's the one I remember, it may have been the one  
13 you played for him. I know you played three.

14 MR. YALOWITZ: I think there was Tirawi Facebook page,  
15 which we said we weren't going to use. Then there were two  
16 videos, one of which was from a much later time period, and he  
17 didn't remember it and I think we concluded that that's just  
18 not going to come in. And then I thought this one, the issue  
19 was just foundationalizing its date.

20 Let's see if we can put it up on the screen.

21 THE COURT: While we are doing that, anything else he  
22 is supposed to rebut?

23 MR. YALOWITZ: The other thing is, we have the police  
24 statement by Ahmed Barghouti. Remember, Ahmed Barghouti is the  
25 Barghouti who took the engineer Abdullah Barghouti from the

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1 prison to the safe house. And Ahmed, in his custodial  
2 statement, which I didn't offer in my direct case, made some  
3 comments about the release of -- said, on the day Abdullah was  
4 released, I got a call and went over to the prison and took him  
5 to the safe house.

6 THE COURT: How does that rebut?

7 MR. YALOWITZ: It's a third guy talking about the  
8 release issue.

9 THE COURT: What are you rebutting?

10 MR. YALOWITZ: The hearsay testimony that he escaped.  
11 Remember, Faraj slipped in this hearsay testimony, oh, I heard  
12 he escaped. We then unredacted the Abdullah Barghouti  
13 statement in which he said I was released. This is the guy  
14 that went and got him from the prison and he also says, he uses  
15 the word released in his statement.

16 I didn't offer it in direct because we had talked  
17 about the issue of the release and I had understood your views  
18 on that. So I want to offer this document in evidence. I just  
19 want to foundationalize it and put it in and say, here is  
20 another document saying he was released, another report.

21 THE COURT: My ruling was a little more limited than  
22 that. My ruling was that you had the right, once that witness  
23 said that he had escaped, to put Abdullah Barghouti's statement  
24 before the witness to ask the witness was he aware of the  
25 statement that he made that he was released. That was for

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1 impeachment purposes. That was not for substantive evidence  
2 purposes.

3 So at that point I thought it was appropriate for you  
4 to cross-examine him with regard to that issue. But now you  
5 simply want to offer extrinsic evidence through this statement  
6 that was otherwise inadmissible through this witness, that was  
7 inadmissible prior to that witness's testimony, and its  
8 admissibility status hasn't changed. I don't know if I would  
9 have granted the application if you said you wanted to ask him  
10 and cross-examine him or try to impeach him with that  
11 statement.

12 MR. YALOWITZ: Let me do this with that document  
13 because I don't think you have seen it.

14 THE COURT: It was attached to your letter, wasn't it?

15 MR. YALOWITZ: 1147B? I'm not sure.

16 THE COURT: Maybe it was attached to their letter.

17 MR. YALOWITZ: So you have it, 1147B. Take a look at  
18 it.

19 If your ruling is you're not going to let it in --

20 THE COURT: You want to let it in now as substantive  
21 evidence of the fact that he was released.

22 MR. YALOWITZ: Right.

23 THE COURT: Because Ahmed said it during his, was it  
24 his interrogation?

25 MR. YALOWITZ: Correct.

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1 THE COURT: That doesn't change its hearsay nature.

2 MR. YALOWITZ: I don't want debate. You know your  
3 views on the hearsay issue. I think you know my view on the  
4 hearsay issue too.

5 My view is it's part of his overall statement. You  
6 have to look at it and draw that line. And if you have looked  
7 at it and drawn the line, then I don't want to debate it with  
8 you. I didn't think you had seen it.

9 THE COURT: I had seen it even before that.

10 MR. YALOWITZ: If you have ruled it's out, that's  
11 fine. We will move on. I didn't understand.

12 THE COURT: We discussed it specifically before.

13 MR. YALOWITZ: I know we have discussed it.

14 THE COURT: I know I have read it.

15 MR. YALOWITZ: You understand where I am with that.  
16 You have got it. It's there. It says what it says.

17 THE COURT: That portion of it, as I say, I don't  
18 think I am going to let you backdoor it, as they say, by trying  
19 to get it in now as substantive evidence when it doesn't  
20 qualify as substantive evidence.

21 MR. YALOWITZ: I understand your ruling on it.

22 THE COURT: It was within my discretion. I think I  
23 gave you the appropriate leeway with regard to cross-examining  
24 that witness about the basis for his saying this person was  
25 released, particularly since he didn't have any personal

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1 firsthand knowledge.

2 So I gave you that other document, let you ask him  
3 about it, and it's out there as something that is not  
4 consistent with his general impression that somehow this guy  
5 escaped.

6 MR. YALOWITZ: OK. I understand your ruling on that.  
7 That's fine.

8 If I had understood it before, we wouldn't have gone  
9 through and around it.

10 THE COURT: Anything else that he is going to testify  
11 to before I hear from Mr. Rochon?

12 MR. YALOWITZ: A couple of other things.

13 There are a couple of dates I want him to nail down,  
14 just very short, that have kind of become relevant based on the  
15 defendants' case.

16 Number one, that this Operation Defensive Shield began  
17 on March 29, 2002. That's just a very basic fact.

18 Number two, that Abu Ali Mustafa was eliminated on  
19 August 27. It has become relevant because we have unredacted  
20 that.

21 THE COURT: We don't have that in evidence?

22 MR. YALOWITZ: Neither of those are in.

23 THE COURT: All right.

24 MR. YALOWITZ: There is one prisoner file where there  
25 was a translation issue.

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1 Faraj, when he was shown the prisoner file of Majed  
2 al-Masri, said it looks like his mother is getting the money.

3 THE COURT: Is he going to say something different?

4 (Continued on next page)

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1 MR. YALOWITZ: No, no, he read it and he's going to  
2 show the jury exactly -- he's going to explain what that -- or  
3 pick word is that Faraj was claiming to translate, and he's  
4 going to link -- he's going to show to a fair-thee-well in a  
5 minute and a half that Faraj is -- that Al-Masri is the one  
6 getting the money, not his mother, not his wife.

7 THE COURT: It doesn't say mother?

8 MR. YALOWITZ: It doesn't say mother.

9 THE COURT: Why is that an expert opinion rather than  
10 a translation opinion?

11 MR. YALOWITZ: It's a translation. He knows how to  
12 translate.

13 THE COURT: But we have the translator who translated  
14 it and you had a guy sitting at the table who was agreeing or  
15 not agreeing with the translation. So where is there some  
16 evidence that is not what it means?

17 MR. YALOWITZ: So I can't put -- I can't -- it's their  
18 case, I can't bring a guy who is a translator and say wait a  
19 minute, this means such and such.

20 THE COURT: You can at the table because the guy was  
21 sitting right next to you. You're saying that that was not --  
22 you want Shrenzel, who is not an expert in interpretation, to  
23 testify to that when nobody -- your expert never said that was  
24 an incorrect statement on the piece of paper?

25 MR. YALOWITZ: Wait a minute, we have got -- I want to

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1 make sure we're talking about apples and apples. So the issue  
2 was not the words coming out of Faraj's mouth, those I didn't  
3 have a problem with the way they were translating.

4 THE COURT: But you said mother of the defendant.

5 MR. YALOWITZ: Right. And that was not correct, and I  
6 don't have any way of putting somebody on while he's testifying  
7 to say he's misreading the word. All I can do is --

8 THE COURT: You did. Well, I guess if it's not -- I  
9 mean I thought he gave us two portions on that document that  
10 referenced the mother.

11 MR. YALOWITZ: Well, that's why we need to clean it  
12 up, because it didn't reference the mother, and it's pretty  
13 obvious that it doesn't, and it's not going to take long to  
14 clean that up, and it goes to the guy's credibility.

15 THE COURT: What is it supposed to say?

16 MR. YALOWITZ: What it says is -- it says the  
17 detainee's or the prisoner's bank account -- it doesn't say the  
18 prisoner's mother, it says the prisoner's bank account, and  
19 then --

20 THE COURT: I think he said what was handwritten said  
21 the prisoner's mother, the mother of the prisoner.

22 MR. YALOWITZ: And that's incorrect, that's an  
23 incorrect reading of those words. That's not what those words  
24 say. They don't say the mother of the prisoner, they say the  
25 bank account of the prisoner. And Faraj wouldn't admit it

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1 because he said the copy was illegible, and it really will not  
2 take long to clean this up.

3 THE COURT: Anything else?

4 MR. YALOWITZ: Yeah, two other things. One is in  
5 response to the Ashrawi testimony -- and I don't know if you  
6 will let me do it, but Ashrawi came and said I'm for peace and  
7 I was there for Arafat in the 2002 period in Washington. What  
8 she didn't say is that as a result of Arafat's conduct, the  
9 President of the United States -- because I started to ask her  
10 this question and you sustained the objection -- the President  
11 of the United States decided that he would no longer deal with  
12 Arafat because, in the views of the United States government,  
13 Arafat was compromised by terror. And the President made that  
14 announcement in a speech on June 24.

15 THE COURT: Made an announcement that Arafat has been  
16 compromised by terror?

17 MR. YALOWITZ: Yes, he said I call on the Palestinian  
18 people to elect new leadership uncompromised by terror. So I  
19 would like to offer that to rebut the Ashrawi testimony.

20 THE COURT: The fact that he says I want new  
21 leadership uncompromised by terror, why does that necessarily  
22 mean that the old leadership was compromised by terror?

23 MR. YALOWITZ: Because that was the conclusion the  
24 White House reached in 2002.

25 THE COURT: I'm not going to allow that.

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1 MR. YALOWITZ: Okay, fine. You understand what I'm  
2 offering it for.

3 THE COURT: No, I don't. I mean unless it's for  
4 improper purpose, then I understand it, but for a proper  
5 purpose, no, I don't understand it. You want him to testify  
6 that he heard that the President of the United States accused  
7 Arafat of being a terrorist? That's basically what you said to  
8 me.

9 MR. YALOWITZ: That the President reached that  
10 conclusion based on the evidence available to him.

11 THE COURT: And you think that's admissible for some  
12 purpose in this trial that makes it more or less likely that  
13 they were involved in the terrorist attacks?

14 MR. YALOWITZ: I think -- I didn't offer it in my case  
15 in chief. I did not offer it in my case in chief. I did not  
16 expect that what we would have is bland generalizations from  
17 some minister without portfolio saying we were all for peace.

18 THE COURT: Why is that a surprise to you? It wasn't  
19 a surprise to me or anybody else in this room that there they  
20 were going come in here and say we are not terrorists, we  
21 didn't participate in terrorist acts, and we were negotiating  
22 peace and that was our intent. That was no big surprise to  
23 you. I'm sure you didn't expect them to say the opposite.

24 MR. YALOWITZ: I expected them -- I don't know what I  
25 expected them to do.

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1 THE COURT: That's what I expected them to do.

2 MR. YALOWITZ: I didn't expect Ashrawi, until she came  
3 in the last minute and gave these bland generalizations --  
4 that's fine, she gave these bland generalizations, which I  
5 don't think are appropriate at all, on whether these six  
6 attacks were perpetrated by a PA employee acting within the  
7 scope of employment.

8 But now it's out there, and I think it's fair rebuttal  
9 to say well, when you went to the President -- when you went to  
10 the United States to give your bland generalizations, they  
11 didn't believe you, and they didn't believe you because they  
12 saw the evidence of what they were actually doing rather than  
13 the pretty words that you were coming to offer.

14 THE COURT: That's pretty loaded, that they saw the  
15 evidence of what you were actually doing. You have absolutely  
16 no one, Shrenzel or anybody, that can testify to that.

17 MR. YALOWITZ: Shrenzel is an expert. I have hearsay  
18 evidence.

19 THE COURT: Expert doesn't get you to say anything  
20 that you want to say.

21 MR. YALOWITZ: You understand my theory of it.

22 THE COURT: He can't testify to it.

23 MR. YALOWITZ: That's fine. The final thing is we had  
24 a lot of testimony in the defense case from Hussein Al-Sheikh,  
25 who came on video and said, among other things, you know, I was

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1 imprisoned for being in the PLO, and they had this guy on for a  
2 long time. And Al-Sheikh, on the day that Arafat died, issued  
3 a video statement, it was on video, saying basically force is  
4 the right path, force is the way to end the occupation, and I  
5 think that that is -- again, I didn't --

6 THE COURT: Meaning what? You want to say that means  
7 that he says do terrorist bombings and shootings?

8 MR. YALOWITZ: What I want to say is when he -- when  
9 he gave his testimony saying we're all for peace, that was in  
10 2010, that's inconsistent with what he said back in 2004.

11 THE COURT: But why is that rebuttal? Why isn't that  
12 the subject cross-examination if you thought there was a  
13 appropriate cross-examination?

14 MR. YALOWITZ: I can't cross-examine a deposition.

15 THE COURT: You mean the deposition. Well, you could  
16 have at the time when he said it, the witness, that you could  
17 have.

18 MR. YALOWITZ: Whatever, somebody else could have.

19 THE COURT: Not you personally.

20 MR. YALOWITZ: I understand you mean the royal "you."

21 THE COURT: Stepping in the shoes of the person.

22 MR. YALOWITZ: In fact, I think it was the subject of  
23 his deposition, and we could play that portion of his  
24 deposition in which he is shown the video, we'll show the  
25 video, and then we'll say okay, that -- let's show the video

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1 that -- he's shown a video, he's asked is that you, he says  
2 yeah, that's me, I said that.

3 THE COURT: But other than impeachment, is there any  
4 other substantive purpose for that extrinsic evidence?

5 MR. YALOWITZ: It goes to the question -- it's fair --  
6 if you say impeachment, cross-examination --

7 THE COURT: It makes a difference.

8 MR. YALOWITZ: It's a fair basis.

9 THE COURT: For impeachment only.

10 MR. YALOWITZ: To question his statements or the  
11 impression that the defendants want to leave that everything  
12 that Hussein Al-Sheikh was about was humanitarian assistance.  
13 And you remember we went back and forth.

14 THE COURT: To further what argument, that he should  
15 not be believed, or further some argument about terror?

16 MR. YALOWITZ: To go to the argument about terror.  
17 It's both, but I think --

18 THE COURT: How does it go to whether it makes it more  
19 likely than not that the PA or the PLO was involved in these  
20 terrorist acts because he said in an announcement that I think  
21 we're going to have to resort to an armed struggle?

22 MR. YALOWITZ: Because he's the guy who is requesting  
23 and -- we're requesting Arafat's approval to pay money to  
24 terrorists. So he write these letters saying, you know, please  
25 give \$2,000 to each of these three warrior brothers, and then

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1 the defendants come and say no, they weren't warriors, they  
2 were just strugglers, and so there's a debate about what was  
3 his knowledge and intent when he asked for money for people  
4 designated as terrorists.

5 THE COURT: And you want to put in what evidence?

6 MR. YALOWITZ: It's just a video Al-Sheikh saying  
7 Arafat stood for armed struggle.

8 THE COURT: Have I seen this?

9 MR. YALOWITZ: I don't think we've offered it before.

10 THE COURT: Can I see it?

11 MR. YALOWITZ: Yeah. We happen to have it ready.

12 THE COURT: Very good. This was not the subject of  
13 his examination at deposition?

14 MR. YALOWITZ: It was. He was asked is that you, and  
15 he confirmed it was.

16 THE COURT: There were no substantive questions about  
17 his motives or what he meant.

18 MR. YALOWITZ: I don't think so.

19 (Video recording played)

20 THE COURT: You believe he's talking about terrorist  
21 acts when he makes that statement publicly?

22 MR. YALOWITZ: I do believe that, yes.

23 THE COURT: He's not talking about a terrorist act,  
24 he's not talk about a suicide bombing, he's not announcing in  
25 this interview that he's asking people to do suicide bombings

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1 and shootings. I assume that's not your argument.

2 MR. YALOWITZ: No, this is the day after Arafat died.  
3 He's reflecting on the legacy of Arafat.

4 THE COURT: But the fact that he made the statement  
5 after Arafat died, how is that substantive evidence that makes  
6 it more likely than not that the PA was involved, or the PLO?

7 MR. YALOWITZ: It goes to knowledge. It goes to  
8 knowledge.

9 THE COURT: Whose knowledge?

10 MR. YALOWITZ: The knowledge of Arafat and --

11 THE COURT: Arafat is dead.

12 MR. YALOWITZ: Right. So the knowledge of Arafat and  
13 Al-Sheikh, it goes particularly to his knowledge and the  
14 relationship between them in that one of my arguments is that  
15 the PA and the PLO, through Arafat, Al-Sheikh and others,  
16 provided material support to Al Aqsa Brigades in the form of  
17 money. That is a very simple argument. The jury needs to  
18 connect the dots between an Al Aqsa attack and Arafat knowingly  
19 provided material support to Al Aqsa, and among the issues is  
20 knowledge, and so --

21 THE COURT: Knowledge of what?

22 MR. YALOWITZ: Knowledge knowing material support, did  
23 they know that they were giving money to people who were  
24 engaged in terrorist activities in, admittedly, the period  
25 before --

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1 THE COURT: How does this reflect that?

2 MR. YALOWITZ: So when the defendants offer testimony  
3 from a witness who was implicated in giving money to terrorists  
4 and they say see, he was just offering humanitarian aid, then  
5 they're saying he didn't know these people were terrorists. So  
6 when he makes a statement on television on the death of Arafat  
7 saying armed struggle is the best way to get rid of the  
8 occupation, then that supports the inference that when he was  
9 giving money to terrorists he understood that they were  
10 terrorists.

11 THE COURT: I understand your argument, but I'm not  
12 going to allow it. So that application is denied.

13 Is that pretty much it for Shrenzel?

14 MR. YALOWITZ: Yeah, there are two, right, two  
15 perpetrate -- two photos I want to offer with him that  
16 apparently we didn't put in a photograph of Marwan Barghouti.

17 THE COURT: I thought we did.

18 MR. YALOWITZ: I thought we did, too.

19 THE COURT: Didn't we show a photo of Marwan Barghouti  
20 to the jury?

21 MR. YALOWITZ: I thought we had, but I didn't find any  
22 record that has been admitted in evidence. I don't think it's  
23 going to be controversial. Then I also want a photo just to  
24 help the jury of the father of Mosaab Yousef so the jury can  
25 visualize the people.

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1 THE COURT: The one talking about at the location  
2 where they were doing the arrests?

3 MR. YALOWITZ: Right.

4 THE COURT: Let me hear what portion Mr. Rochon  
5 objects to.

6 You have one more?

7 MR. YALOWITZ: I think that's it. You want to see  
8 217?

9 THE COURT: What did you want to do with it?

10 MR. YALOWITZ: Let's look at 217.

11 THE COURT: My recollection is a little vague.

12 (Video recording played).

13 THE COURT: That's it?

14 MR. YALOWITZ: That's it.

15 THE COURT: So you want this to stand for the  
16 proposition that they were doing what with Hamas when they said  
17 they were under the protection in the Gaza strip at that time  
18 under the protective forces, security forces?

19 MR. YALOWITZ: That that rebuts the testimony of Faraj  
20 that they were trying to arrest Hamas operatives.

21 THE COURT: But they did arrest Hamas operatives.

22 MR. YALOWITZ: Well, they arrested -- we know of one  
23 that they arrested and released.

24 THE COURT: But it doesn't rebut that they were trying  
25 to arrest Hamas operatives, but they weren't -- you conceded

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1 that they were arresting Hamas operatives.

2 MR. YALOWITZ: It tends to support my theory of the  
3 case and rebut the defendants' theory of the case. The  
4 defendants' theory of the case is that they never had a good  
5 relationship with Hamas, they never had any cooperation with  
6 Hamas, they were always trying to arrest Hamas operatives. And  
7 my theory of the case is they had an on-again off-again  
8 relationship with Hamas, and there were times -- and the  
9 intifada was one of them where they cooperated with Hamas and  
10 protected Hamas operatives.

11 THE COURT: And what protection do you say he's  
12 referring to, since I don't have anybody who is authenticating  
13 this statement?

14 MR. YALOWITZ: I think that the inference -- the fair  
15 inference, and he says I'm giving the example of Gaza, because  
16 I don't want to go into what was going on in the West Bank, but  
17 I think the fair inference is both in Gaza and in the West Bank  
18 there were time when the preventive security force was  
19 protecting Hamas operatives.

20 THE COURT: In what way?

21 MR. YALOWITZ: By keeping them out of the hands of the  
22 Israeli authorities.

23 THE COURT: You mean by harboring a Hamas person that  
24 the Israeli government indicated that they were attempting to  
25 arrest?

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1 MR. YALOWITZ: That would be one example, which is the  
2 example in our case.

3 THE COURT: What is the evidence of that in this case,  
4 or that you say supports --

5 MR. YALOWITZ: In this case we know -- the jury  
6 doesn't know, but we know that Jabril Rajoub, who was this  
7 guy's counterpart, took a Hamas bomb maker and gave him to  
8 Marwan Barghouti and he put him in a safe house. We know that.

9 THE COURT: And you think that's what is he  
10 referencing in this statement?

11 MR. YALOWITZ: I think that's among the things that  
12 he's referencing.

13 THE COURT: What gives you -- what makes you think  
14 that rather than want to think that?

15 MR. YALOWITZ: Because that's the evidence we have in  
16 this case of protecting a Hamas operative.

17 THE COURT: I understand. I still think that that's  
18 inadmissible. I think it's taken out of context. It's clear  
19 that's not what he is trying to say publicly. If he was, that  
20 would even be inconsistent with your theory that they're saying  
21 one thing and doing something else.

22 That's the whole problem with allowing public  
23 statements, they're inconsistent with your position that  
24 they're saying they're for peace but they are really behind  
25 terrorist attacks. Well, these are not statements saying we're

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1 behind terrorist attacks, nor do you contend that they ever  
2 made any public statement that if they were anything they were  
3 mouthing public statements that they were in peace negotiations  
4 and they were trying to live up to the Oslo Accords, but it's  
5 that surreptitiously they were doing something different. This  
6 isn't the surreptitious part, this is the public part.

7 MR. YALOWITZ: I may have misremembered your ruling on  
8 this, or you may -- on reflection, it doesn't matter.

9 THE COURT: That's my position.

10 MR. YALOWITZ: I understand your ruling, that's fine.

11 Let's just move forward, that's fine.

12 THE COURT: Mr. Rochon, given the parts that I say  
13 that I don't think that we should get back into, what else do  
14 you specifically object to him testifying?

15 MR. ROCHON: I won't address anything in which you  
16 already ruled or have a firm opinion that it's out. I want to  
17 make sure that I cover everything, because I don't think  
18 there's any improper rebuttal on what's been said at all, but a  
19 couple are closer than other, I will admit.

20 On Tirawi, I don't know if the Court ruled that  
21 Shrenzel can rebut Shrenzel, not the defense case, but however  
22 one characterizes it, we do object to that. The testimony, in  
23 reality, we heard a lot of things about this, last week  
24 plaintiff's counsel was arguing that Tirawi had been pardoned  
25 in 2003, now we are hearing -- but it's less specific as to the

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1 date, what he said, and there are several answers here about  
2 when Shrenzel was testifying, he said Israel was not able to  
3 capture him.

4 THE COURT: That was my recollection.

5 MR. ROCHON: That is not a statement that is -- that's  
6 not consistent with how --

7 MR. YALOWITZ: Sorry, Mr. Rochon, who said that?

8 MR. ROCHON: Mr. Shrenzel, page 1514 of the transcript  
9 of this trial.

10 THE COURT: Go ahead.

11 MR. ROCHON: And he went on to clearly give the  
12 impression that anyone would have been left with that the only  
13 reason this guy wasn't charged is because they couldn't capture  
14 him.

15 In fact, were he captured by the Israelis, as we would  
16 really like to do, he would have been indicted. The impression  
17 was clear, the testimony in the defense case is not being  
18 rebutted here. In fact, what they're doing is offering  
19 Shrenzel the opportunity to I guess correct what he said.  
20 That's not rebuttal. The time for him to have corrected what  
21 he said was while he was on the stand under oath the first  
22 time, not to come in now and say something different.

23 THE COURT: Well, he didn't have to clear it up if you  
24 weren't going to dispute it.

25 MR. ROCHON: I kind of had to dispute it.

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1 THE COURT: He would have let it rest if you hadn't  
2 come in and said that's not what happened. I guess he figured  
3 he wouldn't have to bother.

4 MR. ROCHON: He might not have had to bother, but I  
5 don't think the plaintiffs get to do a do over with their  
6 witness because they put on testimony that is inconsistent with  
7 what he said on direct. He's not going to come in and say it  
8 again, he's going to say the part about the reason that he  
9 wasn't charged is because we couldn't capture him, no, the  
10 reason is because we pardoned him or released him or changed  
11 our view. That's not proper rebuttal, so he should not be  
12 allowed to testify.

13 THE COURT: I understand your position -- and I think  
14 this is a close one, but I think I go in their direction on  
15 this one, mainly because I think the jury at this point -- if  
16 they want to change the issue with regard to Shrenzel's  
17 testimony from he didn't know what he was talking about to he  
18 deliberately misled you, then I'm sure that you have the  
19 sufficient skills to make that point in front of the jury if he  
20 wants to get up now and give testimony that is different than  
21 what he gave before. And I have specific instructions in my  
22 jury instructions with regard to witnesses that give testimony  
23 in one regard and give different testimony on a different  
24 occasion.

25 Frankly, in my view, that testimony, if he says that

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1 in the way that Mr. Yalowitz is now proffering, it would be  
2 inconsistent with the testimony that he gave when he first got  
3 on the stand. And I think the jury should have the full  
4 opportunity, given the fact that you put in evidence that  
5 disputes what he said, for them to assess whether they think he  
6 was mistaken or he was deliberately misleading. I think that  
7 if he wants to call him for that purpose then he has to face  
8 further cross-examination and be confronted with the statements  
9 that he made and the fact that he never said that, and now he's  
10 here to say it now only because it was demonstrated that what  
11 he said was not true.

12 MR. ROCHON: I understand the Court's ruling. I think  
13 we do need a really specific proffer if the plaintiffs are  
14 going to try to get into why or how, A, he knows this new  
15 information and what levels of hearsay are behind it, or that  
16 he will offer, because --

17 THE COURT: It depends on what you think he's going to  
18 say. I don't think he has -- I think he's simply going to say  
19 that he agrees with you, that they didn't -- that they made an  
20 ultimate decision that they didn't want to arrest him. I don't  
21 think anybody disputes that. The question is not whether he's  
22 going to say that, if that's what they're going to call him  
23 for, the question is why didn't he say that when he first was  
24 on the stand and had a full opportunity to do so.

25 MR. ROCHON: I agree. My concern is I don't want to

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1 have testimony that we haven't got a specific proffer on. If  
2 Mr. Yalowitz is going to try to ask him why did Israel decide  
3 not to arrest him, I don't think that this witness should get  
4 into hearsay that will again repeat out-of-court information  
5 implicating Mr. Tirawi in the guise of explaining Israel's  
6 decision not to charge him. So I would like to ask the Court  
7 if you could have Mr. Yalowitz give a proffer as detailed as  
8 the one I was giving on my --

9 THE COURT: What is he going to say?

10 MR. YALOWITZ: They had a policy change. He's not  
11 going to talk about -- I don't want him talk about -- I will  
12 instruct him not to talk about the evidence implicating Tirawi.  
13 I don't -- I think that's done. Whatever is in on that is in.

14 THE COURT: But is he going to say anything other than  
15 the change of policy was that they decided to say never mind,  
16 we don't -- we decided we don't want the guy? Is there some  
17 policy?

18 MR. YALOWITZ: I think that's enough.

19 THE COURT: Is there some other policy that you are  
20 going to elicit?

21 MR. YALOWITZ: No, I wasn't planning to.

22 THE COURT: Okay. He's going to say that they had a  
23 change of mind, they no longer wanted him, and he's going to  
24 say that ultimately after they did not find him, if that's what  
25 he meant to say, or they could not find him, when they did find

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1 him, they decided that they didn't want him anyway, and that  
2 was their change in policy by the time they found him.

3 MR. ROCHON: I don't know if that's what the proffer  
4 is.

5 THE COURT: That's what I just heard.

6 MR. ROCHON: I don't know about this thing when they  
7 found him.

8 THE COURT: Not when they found him.

9 MR. ROCHON: I heard this 2003 date the other day from  
10 Mr. Yalowitz.

11 MR. YALOWITZ: That's not correct, 2003 -- look, the  
12 policy change was 2005, the 2003 I was relying -- frankly, I  
13 heard that testimony from Faraj, it was interesting testimony  
14 to me and I needed to investigate it. But Faraj on  
15 Mr. Rochon's questioning made it sound like 2003 was the key  
16 date. So I was going off of what Mr. Rochon's questions were.  
17 In fact, as I understand the facts, it's not 2003.

18 THE COURT: Well, you know what, the reality is I'm  
19 not particularly interested in limiting his testimony at all.  
20 I'm pretty much interested in what his explanation is for why  
21 he told the jury that he wasn't arrested because they couldn't  
22 find him, and now he's saying that oh, that's not true, they  
23 really just decided that they didn't want him, and if I gave  
24 you the impression that the only reason why he's not indicted  
25 and in an Israeli jail is because someone protected him from

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1 the Israelis and they weren't able to do that, I'm sorry,  
2 that's not the impression I meant to give you. If he wants to  
3 say that, that's fine.

4 MR. ROCHON: I want to make sure there's no other  
5 hearsay that comes in from this guy about Tirawi or the  
6 decision making, because I think this is now more fact  
7 testimony than expert testimony.

8 THE COURT: No, I mean, as I say, I don't expect him  
9 to give us any new facts than he already testified to and that  
10 you already put in evidence on your case. He's going to say  
11 yes, that there did come a time that they decided they didn't  
12 want him, and I'm sure if you want to cross-examine him  
13 further, and that's your decision, he will be in a position to  
14 have to say yes, there was a significant period of time,  
15 probably right up until today, that, if they wanted him, they  
16 could have taken some efforts to get him, and they decided they  
17 no longer wanted him. There was a change in their position,  
18 and that is really the reason why he's not in prison today, not  
19 because they can't find him, because he's real easy to find.

20 MR. ROCHON: I understand the Court's ruling on that  
21 one.

22 THE COURT: The jury can assess, when they hear my  
23 instructions on expert witnesses, and they can evaluate him.

24 MR. YALOWITZ: Several other areas. He said to Majid  
25 Al-Masri, that's the guy whose prisoner of payment record was

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1 shown to Faraj, and now the plaintiffs want to say that Faraj  
2 was wrong about how he read it. That ostensibly impeaches  
3 Faraj, but they didn't do the critical step necessary before  
4 impeachment, which is confront him with the claim that he was  
5 translating improperly, even though they had a guy sitting  
6 there or special request to sit at counsel table and never said  
7 to Faraj: Isn't that wrong? Please explain.

8 That is what a witness is entitled to before they are  
9 impeached with this inconsistent evidence, and they did not  
10 that. They said this is a credibility cross. It's unfair to  
11 the witness to do that, especially when we went through all the  
12 machinations to make sure they were in the position to know  
13 what was being said. In fact, it's their document. They  
14 didn't have to rely on what the translator was saying, they had  
15 the document in front of them since the beginning of the case.

16 THE COURT: Was that portion of the document ever  
17 translated on the document?

18 MR. YALOWITZ: Yes.

19 MR. ROCHON: The document was translated, but not the  
20 handwritten portion that he was referring to.

21 THE COURT: The handwritten portion was not  
22 translated?

23 MR. YALOWITZ: No, it is, it is translated.

24 THE COURT: What does it say?

25 MR. YALOWITZ: It says the account of the prisoner.

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1 THE COURT: That's how it's translated?

2 MR. YALOWITZ: Right.

3 MR. ROCHON: If we could, please, your Honor, if one  
4 looks at their exhibit, the English version has a square with  
5 writing inside of it, nothing on top. The Arabic version that  
6 the witness looked at has writing on top of that square, which  
7 is what the witness was referring Mr. Yalowitz to.

8 THE COURT: But that writing was never translated in  
9 the English version.

10 MR. ROCHON: In English version.

11 THE COURT: In the English version it wasn't  
12 translated?

13 MR. ROCHON: Of the exhibit.

14 THE COURT: On the exhibit itself.

15 MR. ROCHON: Right. And go to page 9484.

16 THE COURT: Is there a reason why that wasn't  
17 translated?

18 MR. YALOWITZ: It was translated, he's just not  
19 reading it right. May I hand it up?

20 MR. ROCHON: Let me make sure I'm talking about the  
21 same page.

22 MR. YALOWITZ: Page 9484, it says beneficiary's  
23 account number, and in brackets, handwritten.

24 Let's try get our facts right here.

25 MR. ROCHON: So, Judge --

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1 THE COURT: You're saying the handwritten part says  
2 Bank of Palestine LTD. What are you saying is the handwritten?

3 MR. ROCHON: Judge, if you look at that document and  
4 then advance forward, please, see the one on the right, that is  
5 the Arabic version, you see the handwriting?

6 THE COURT: Yes, at the top.

7 MR. YALOWITZ: It's not translated is what I said.  
8 Maybe I did get my facts right. Sometimes even a blind  
9 squirrel finds a nut.

10 THE COURT: So --

11 MR. ROCHON: Handwriting on the bottom.

12 THE COURT: But the handwriting on the top is what  
13 he's referring to?

14 MR. ROCHON: That's what the witness was referring to  
15 to Mr. Yalowitz.

16 THE COURT: And that's not translated into English on  
17 document?

18 MR. ROCHON: That's what it appears to me.

19 MR. YALOWITZ: He's mistaken about that.

20 THE COURT: Where is it translated into English?

21 MR. YALOWITZ: It says beneficiary's account number,  
22 bracket, handwritten.

23 THE COURT: Right, it says handwritten. So when you  
24 say handwritten, what is it supposed to say? What does it say?

25 MR. YALOWITZ: The handwriting says beneficiary's

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1 account number.

2 THE COURT: That's what you say that the handwritten  
3 notation says?

4 MR. YALOWITZ: Right.

5 MR. ROCHON: And the witness says that it says  
6 something about beneficiary's mother.

7 THE COURT: Right.

8 MR. YALOWITZ: This writing about Bank of Palestine,  
9 that's Bank of Palestine.

10 THE COURT: But what are you saying that the witness  
11 will say that the top says?

12 MR. YALOWITZ: He will say it says beneficiary's  
13 account number.

14 THE COURT: Wasn't there also another notation where  
15 he says that said something about the mother?

16 MR. ROCHON: There's a separate page in the same  
17 exhibit where he referenced the mother as well.

18 MR. YALOWITZ: And that wasn't true either.

19 THE COURT: What is that supposed to say,  
20 Mr. Yalowitz? Do we have that page?

21 MR. YALOWITZ: With respect to the other page, which  
22 is the fifth page of the document, it says beneficiary named  
23 Majid Al-Masri, relationship, the detainee himself, and  
24 Al-Masri -- I mean Faraj said well, that I can't read because  
25 it's illegible. So he didn't -- he wasn't willing to admit --

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1 THE COURT: Is that translated?

2 MR. YALOWITZ: Yeah.

3 THE COURT: And is it in English?

4 MR. YALOWITZ: In English it says relationship, the  
5 detainee himself. It's under item four, beneficiary name and  
6 relationship.

7 THE COURT: But he didn't -- there's no dispute as to  
8 the translation here.

9 MR. YALOWITZ: Well, apparently there is.

10 THE COURT: No, is there?

11 MR. YALOWITZ: As between the lawyers?

12 THE COURT: No, what do you say that he said was on  
13 the page?

14 MR. YALOWITZ: He said he couldn't read it.

15 THE COURT: He said he couldn't read it, but he didn't  
16 say it says something different than what you translated.

17 MR. ROCHON: Judge, on the other document, which is  
18 still on the screen, there's also -- I'm not sure you can see  
19 it through the screen in the courtroom, there's also some  
20 handwriting on the bottom of the document.

21 THE COURT: Is that at issue?

22 MR. ROCHON: Well, what the witness was referring to  
23 when he said it was Umm Hasan, Mr. Yalowitz was at the stand  
24 with him so -- it wasn't on the screen for the witness to point  
25 to where exactly he was reading this.

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1 My point is that --

2 THE COURT: So are you arguing he was reading from the  
3 bottom?

4 MR. ROCHON: I'm arguing that he said it said Umm  
5 Hasan, and most importantly, they didn't confront him with that  
6 is not what it says, what you were reading is not what it says,  
7 they didn't confront him with that.

8 THE COURT: They did confront him, he said is that  
9 what it says, and he said yes.

10 MR. ROCHON: He said doesn't it say detainee, his  
11 handwriting says Umm.

12 THE COURT: So they did confront him.

13 MR. ROCHON: But what they didn't confront him with  
14 was the idea was he misreading, and the witness is entitled to  
15 that.

16 THE COURT: They did confront him, they said doesn't  
17 it say something different than what you had translated. They  
18 said doesn't it say beneficiary, that's the very first  
19 question, and he said no.

20 MR. ROCHON: Mr. Yalowitz never questioned whether he  
21 was reading the words correctly. In fact, he backed off the  
22 examination.

23 THE COURT: Well, bottom line is that's what the  
24 document says, so I don't know how you could back away from  
25 what the document says. You are the one who wants to rely on

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1 the fact that the document now says something different than  
2 what the translation says.

3 MR. ROCHON: I never asked him about the document, I  
4 wasn't going into this.

5 THE COURT: But your document doesn't say what he says  
6 it said.

7 MR. ROCHON: I don't know why the Court says that.

8 THE COURT: Because it says beneficiary, your  
9 translation, you don't have a translation that says what he  
10 said.

11 MR. ROCHON: He was pointing at some handwriting on  
12 the document.

13 THE COURT: And your responsibility, and I'm sure you  
14 thoroughly did so, was to make sure that everything that was  
15 translated in English was an accurate translation on the  
16 document. Otherwise, they slipped in "terrorist," right? I'm  
17 sure you made sure that that did not happen. So it was your  
18 responsibility, if you thought this was -- matter of fact, this  
19 is what impeaches him, it doesn't say what he says it says.  
20 The translation doesn't say that.

21 MR. ROCHON: If that's what impeaches him then we  
22 don't need a witness. The witness is going to be focusing not  
23 on that English translation but on the other one. So this  
24 isn't a question of what the English version says, it's a  
25 question on what the witness says on the Arabic version.

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1 THE COURT: I will disagree with you. He can use this  
2 witness as well as a probably a number of witnesses to  
3 demonstrate that in Arabic it doesn't say what he says it says.  
4 And he can also emphasize to the jury that the English  
5 translation doesn't say what he says it says, if that's going  
6 to make any difference whatsoever in the jury's determination  
7 in this case.

8 MR. ROCHON: Understanding that, I would suggest to  
9 the Court there is other handwriting on this document that is  
10 clearly not the translated under anything.

11 THE COURT: Then you are stuck with it, aren't you?  
12 You should have translated it if you wanted it translated. If  
13 you want somebody now who wants to translate it, you can bring  
14 them in.

15 MR. ROCHON: I don't think it's a big issue.

16 THE COURT: I don't either.

17 MR. ROCHON: But I don't want my witness impeached on  
18 a credibility point when he wasn't fairly confronted.

19 THE COURT: But he was confronted. He was shown the  
20 document. He was asked is this what it says, and said no. He  
21 gave his own view of what it says. What is he supposed to do  
22 after that, say: Are you sure? How is he supposed to confront  
23 him? He showed him the document, and Mr. Yalowitz demonstrated  
24 his shock when the guy said it says mother, because Yalowitz  
25 said to him wait a minute, where does it say that, and the

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1 document before the jury didn't say that.

2 MR. ROCHON: Mr. Yalowitz actually did not say where  
3 does it say that. If he said that, then the witness would have  
4 pointed somewhere and we would have proper impeachment.

5 THE COURT: I'm not sure -- he was definitely asked,  
6 because he pointed out where it was that said mother of the  
7 person, and he pointed to it, and he showed Mr. Yalowitz where  
8 it said it.

9 MR. ROCHON: That's where I disagree with the Court.  
10 Mr. Yalowitz stayed right here going back and forth with his  
11 colleagues and did not go to the witness and say show me where  
12 it says that.

13 THE COURT: Well, you can look at the transcript, but  
14 it was clear that the guy knew what he was being asked, he was  
15 saying that it said something different than what we know --  
16 everyone in this room knows what he said is not in the  
17 translation. It is not in the translation.

18 So if you thought that there was some  
19 misunderstanding, you could have asked him. It is not on the  
20 translation. That alone they could use to impeach him, because  
21 there's no translation of any document -- and both sides knew  
22 that this document was translated, there's no translation of  
23 any document that says what he says it said.

24 MR. ROCHON: If Mr. Yalowitz wanted to use the English  
25 language to impeach him, I wasn't objecting, that's in

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1 evidence, but we object to another witness coming in to impeach  
2 him when he wasn't adequately confronted.

3 THE COURT: Well, he was confronted sufficiently, so  
4 I'm going to -- since, one, he was asked on cross-examination,  
5 not on direct examination, number two, he was directly pointed  
6 to that -- and I have to look at the transcript, you can look  
7 at the transcript, and three, the portion that everybody else  
8 in this room thought said beneficiary account in handwriting,  
9 he's now saying says something different, and he was clearly  
10 confronted with it. He doesn't have to be accused of being a  
11 liar, he just has to show him document and that's what he  
12 confronts him with it. There's no secret of what he was being  
13 asked about.

14 So that they could ask him or anybody else who  
15 understands that language. And if you have an interpreter who  
16 wants to come in and say that's an accurate interpretation --  
17 because you're not even saying that, you can't fault them for  
18 the guy sitting next to them. Fine, you have plenty of people  
19 who speak Arabic, let them show you where it says that.

20 MR. ROCHON: I understand the Court's ruling.

21 The other things that were proffered, I want to cover  
22 them, but the plaintiffs said they want to introduce a  
23 photograph of Marwan Barghouti. There is one of him in  
24 already.

25 THE COURT: I thought there was.

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1 MR. ROCHON: You allowed it in over objection of him  
2 at a funeral procession or something, so they could do a still  
3 from that.

4 THE COURT: It was a video?

5 MR. ROCHON: Yes.

6 THE COURT: I don't remember which video. Which one  
7 is that?

8 MR. ROCHON: The one of him making statements and we  
9 didn't win.

10 THE COURT: That was offered on the case in chief?

11 MR. ROCHON: Yes.

12 THE COURT: I remember in general now.

13 MR. ROCHON: Then also there's a photograph of Yasser  
14 Arafat holding a photograph of him, so that's in evidence. And  
15 then the one they want to introduce is one of him in manacles.  
16 We don't need a photograph of Marwan Barghouti in manacles. If  
17 they have a non-pejorative photograph of him not in manacles,  
18 I'm not going to object. I don't think that's rebuttal, but --

19 THE COURT: If that's the photo they want, and we  
20 already have photos in, I won't let it in.

21 MR. YALOWITZ: We'll see if we can find one that is  
22 agreeable to both sides.

23 THE COURT: The one already in evidence is the one  
24 agreeable to both sides.

25 MR. YALOWITZ: Let me look and see, because there is a

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1 video, it's a very degraded quality, we just want the jury to  
2 be able to see the guy's face.

3 MR. ROCHON: If we find a non-pejorative one, I won't  
4 make a big deal about that.

5 As far as the photograph of this fellow Mosab Hassan  
6 Yousef's father, that rebuts nothing. And that is such a side  
7 issue, the father of this guy, that putting in the rebuttal I  
8 think should not be allowed. Unlike Marwan Barghouti, it's  
9 part of this trial, whether we like it or not, you ruled his  
10 conviction comes in, there's been conversation about him. This  
11 guy's father --

12 THE COURT: There's been conversation about him, too.

13 MR. ROCHON: Very little. He's said to be a Hamas  
14 person, and putting in his photo to prove what?

15 THE COURT: He was the person that did the  
16 negotiations supposedly to -- isn't it, about how he's going to  
17 be arrested?

18 MR. ROCHON: It rebuts nothing.

19 THE COURT: I thought there was some testimony about  
20 that on cross.

21 MR. ROCHON: There was some testimony about --

22 THE COURT: And you read in the deposition portion.

23 MR. ROCHON: I read in the deposition, but it rebuts  
24 nothing what the father looks like.

25 THE COURT: It's not that big a deal for me. I don't

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1 think it makes any difference.

2 MR. ROCHON: When something is not a big deal -- I  
3 didn't object to something that is not a big deal, if they want  
4 Marwan Barghouti --

5 THE COURT: This one you want to keep out.

6 MR. ROCHON: Yes, because it's a distraction from the  
7 issues in this case.

8 THE COURT: Fine. Unless Mr. Yalowitz has some strong  
9 argument to make as why it is compelling to get this photo in  
10 front of the jury, I am not going to let him do it at this time  
11 if you object.

12 MR. YALOWITZ: Let me just say really what I want to  
13 do is no secret. This deposition testimony is useful to my  
14 case. I just want to have photographs of the players so that  
15 the jury can understand who the different people are.

16 THE COURT: I understand what you want to do, and I  
17 don't think there's anything illegitimate about it except that  
18 he's right, this is an afterthought now, and it's not proper  
19 rebuttal. It's not. So if he objects to it, I will give him  
20 technically that foul and you get a free foul shot.

21 MR. YALOWITZ: Fine. I can do it with a shadow, I can  
22 illustrate it without a photo.

23 THE COURT: Maybe you can trade him off something  
24 else.

25 MR. YALOWITZ: Since we're so close to each other.

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1 MR. ROCHON: They said they wanted to move in the date  
2 of the beginning of Operation Defensive Shield. There was  
3 testimony that it was late March, but if he wants to get  
4 specifically March 29, I don't think there's been testimony of  
5 March 29 yet. If somebody says Operation Defense Shield starts  
6 March 29, I don't think it rebuts anything, but frankly it  
7 doesn't matter.

8 THE COURT: If you want to stipulate to those dates,  
9 you can do so and save us all time.

10 MR. ROCHON: If he doesn't testify otherwise, I will  
11 stipulate to when ODS started.

12 Abu Ali's Mustafa's date of assassination I think is  
13 in evidence.

14 MR. YALOWITZ: I don't recall that.

15 MR. ROCHON: I don't think that it rebuts anything in  
16 the case.

17 THE COURT: If you could find where it's in the record  
18 and it's clear, show Mr. Yalowitz and maybe we don't need to go  
19 through it again.

20 MR. ROCHON: Then finally, your Honor, I think that  
21 covered everything that you haven't already excluded, except he  
22 said something about wanting to put on Shrenzel on the hostile  
23 friendly relationship with Hamas, and you asked is that  
24 anywhere in his report, and the answer is no, Shrenzel did not  
25 include in his report that. And I don't think it's proper

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1 rebuttal given the proffer that we have here to have Shrenzel  
2 come in here and start re-opining on that. The evidence on  
3 this -- in the plaintiff's case in chief there was evidence on  
4 this. Having Shrenzel come in and give opinions on this that  
5 weren't in his report and weren't disclosed as rebuttal  
6 evidence is improper rebuttal.

7 THE COURT: I didn't know -- other than the video,  
8 what is he going to say in substance?

9 MR. YALOWITZ: He will say that --

10 THE COURT: Quote him word for word.

11 MR. YALOWITZ: Yes, it was a very good relationship  
12 during this time period and --

13 THE COURT: I thought he already said that.

14 MR. YALOWITZ: Eviatar said that, Eviatar said --

15 THE COURT: That was the subject that the Eviatar  
16 expert used, that was not the subject of Shrenzel's expertise.

17 MR. YALOWITZ: It is a subject of his expertise. He  
18 added this Hamas lexicon. We didn't offer him on that topic.

19 THE COURT: Did he opine about that in his report?

20 MR. YALOWITZ: He did not.

21 THE COURT: We won't go back there. If Eviatar is --

22 MR. YALOWITZ: Frankly it's like a really small thing,  
23 this Sheik Yassin. I was going to do the Dahlan video, which  
24 you said was out. It's very short, and I'm trying to not have  
25 two guys and a Hebrew translator.

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1 THE COURT: I'm not sure I would even let it in as  
2 rebuttal from the other guy, because the other guy is the one  
3 qualified to testify about it. I think to the extent that he  
4 testified about the relationship of Hamas, and to the extent  
5 they put on testimony in response to that, for him to get back  
6 up there and repeat the same things is not rebuttal.

7 MR. YALOWITZ: 20-second time out on this. I want you  
8 to be sure, because I think we're down to a very small thing,  
9 and --

10 THE COURT: I agree, but it still may be important.

11 MR. YALOWITZ: It may be important, but it's not going  
12 to be a lot of time. And the issue is this --

13 THE COURT: Time is not the essence.

14 MR. YALOWITZ: The issue is this, if your ruling is I  
15 don't want him to talk about Sheik Yassin because I don't want  
16 anybody to talk about Sheik Yassin. Okay, if that's your  
17 ruling, then we'll move on. If your ruling is I want Eviatar  
18 to talk about it instead of Shrenzel, I need to understand that  
19 so I can deal with that.

20 THE COURT: You want to impeach this other witness  
21 because he said that the circumstances of this photo was that  
22 the guy was old, released from prison, blind and on his death's  
23 door. Now I mean so you want to bring in some expert to say --  
24 some expert on the Middle East to say it's my opinion that this  
25 guy wasn't ready to die, you got a doctor who could say that?

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1 This guy doesn't say that. Come on, give me a break. This guy  
2 is not qualified to say that.

3 MR. YALOWITZ: It's not his health.

4 THE COURT: It is his health.

5 MR. YALOWITZ: The health of political leaders is  
6 important to people, and the testimony is not his blood  
7 pressure was low that kind of stuff, the testimony is he was at  
8 the height of his powers, and so when --

9 THE COURT: He wasn't at the height of his physical  
10 powers because the jury could see from the photograph the guy  
11 is sitting in a wheelchair looking dazed.

12 MR. YALOWITZ: Okay, that's opinion, but the testimony  
13 is when Yasser Arafat gives the guy a kiss --

14 THE COURT: That was the kiss of death? Is that the  
15 question? Come on, let's focus here.

16 MR. YALOWITZ: What I want to understand is this is  
17 something that I want to address. If you say don't address  
18 that, we'll move on.

19 THE COURT: I will explore as deep as I can what you  
20 say the relevance is and this guy is not qualified, nor is it  
21 appropriate rebuttal for him to come in and say no, this guy  
22 wasn't dying, so Yasser Arafat must be kissing him because he  
23 loves him. That's not what this case is about, and think it's  
24 waste of time. It's an issue that is not appropriate for  
25 rebuttal, given the nature of the testimony. And I don't know

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1 if he could in fact dispute any statement that this witness  
2 made. He may want to dispute the implication, but I don't  
3 think he's here to dispute, one, whether the guy had just been  
4 released from prison, two, whether the guy was in a wheelchair,  
5 three, whether the guy was in bad health, four, whether the guy  
6 was half blind, five, whether the guy had a significant  
7 physical condition which --

8 MR. YALOWITZ: It's not his physical condition. I  
9 want you to tell me where you are on it.

10 THE COURT: Where I am --

11 MR. YALOWITZ: It's not his physical condition, it's  
12 his political condition.

13 THE COURT: What he will say about that?

14 MR. YALOWITZ: That he was still a strong, important  
15 leader for Hamas.

16 THE COURT: We assume that's true since Yasser Arafat  
17 is kissing him on the cheek.

18 MR. YALOWITZ: That's a natural inference.

19 THE COURT: That's what you want to argue from that,  
20 despite what his health was, he didn't kiss everyone who was on  
21 death's door. I mean he picked this guy and posed pictures  
22 with him, I assume it's supposed to show that there's some  
23 reconciliation if not greater affection between these two  
24 individuals. You can argue whatever you want, but this expert  
25 can't tell me whether they're buddy buddy or not because he

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1 kissed him on the cheek.

2 MR. YALOWITZ: All I need you to say is -- when you  
3 say this expert, you mean Eviatar or Shrenzel? Because I don't  
4 want to screw around and bring Eviatar.

5 THE COURT: I mean Eviatar or Shrenzel.

6 MR. YALOWITZ: That's all I wanted to understand.

7 THE COURT: Focus what you want from this guy, get him  
8 in, get him off. You have to find out if he's available  
9 tomorrow.

10 MR. YALOWITZ: We'll figure it out.

11 THE COURT: So when they rest, he's ready to go.

12 MR. ROCHON: And it's Tirawi we talked about, the form  
13 we talked about, and then we'll either work out these dates or  
14 he'll say the two dates.

15 THE COURT: Right. Is there any chance we can shut  
16 this down by lunchtime tomorrow?

17 MR. YALOWITZ: Marwan.

18 MR. ROCHON: And a photo of Marwan, but Judge, we've  
19 got photos of Marwan. Oh, if you get a new photo.

20 THE COURT: Right.

21 MR. ROCHON: I didn't see the witness on that. We'll  
22 stipulate. I know what the guy looks like, I don't need him to  
23 foundationalize photos of Marwan Barghouti.

24 MR. YALOWITZ: I want us to pause and note that we may  
25 actually offer an exhibit in evidence that the defendants don't

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1 object to.

2 MR. ROCHON: That happened many times.

3 MR. YALOWITZ: Before we move off witnesses, Judge,  
4 there's one other thing, which is they're talking about  
5 bringing at least one witness who has a criminal record, Khaled  
6 Abu Al-Yaman. They have given me --

7 THE COURT: Is he one of the three?

8 MR. YALOWITZ: Yes. They have given me some  
9 information about his criminal history. Depending on what he  
10 says, I may ask him some questions about his criminal history,  
11 and I want to make sure if they have an application about that,  
12 they deal with it.

13 THE COURT: Do you know something that they don't?

14 MR. YALOWITZ: I don't know what they know about his  
15 criminal history.

16 THE COURT: You know something more than what they  
17 have given you?

18 MR. YALOWITZ: I believe I do.

19 THE COURT: And you have a good faith basis to pose a  
20 question to this witness with regard to his credibility?

21 MR. YALOWITZ: Indeed I do. I should say I might. It  
22 depends on what he says.

23 THE COURT: I'm not sure why it would depend on what  
24 he says.

25 MR. YALOWITZ: Because when I say what were you

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1 convicted of, if he doesn't say what I know, then I will  
2 confront him about it.

3 MR. ROCHON: So we don't have it. The plaintiffs  
4 disclosed no convictions to us. We disclosed what we're aware  
5 of.

6 THE COURT: And you don't want to give them a heads up  
7 on this one?

8 MR. YALOWITZ: I don't.

9 MR. ROCHON: Well, Judge --

10 THE COURT: This is the way we're going to proceed:  
11 You bring your witness. If you decide that you're going to  
12 want to ask him that question, then you ask for a side bar or  
13 we do it out of the presence of the jury. I will hear what it  
14 is that you think you want to ask him, and if you're not  
15 willing to disclose it to them now, I will make a determination  
16 at that point whether you should have the opportunity to ask  
17 the witness the question and see if he admits it or denies it,  
18 depending on what you -- how you say that conviction may go to  
19 his credibility.

20 MR. ROCHON: Judge, two things. First of all, it's  
21 discoverable if they have such a thing. Second, we're entitled  
22 to take the sting out of prior convictions.

23 THE COURT: It's not discoverable if he asked you for  
24 his prior convictions and you didn't tell him. It's not  
25 discovery. If you didn't represent -- if he did not represent

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1 to you that he had an additional conviction and they think that  
2 they have good faith basis to ask that, you don't have the  
3 right to have them warn you that they're going to catch your  
4 guy in a lie when he gets on the stand.

5 So you better warn your guy that they think that they  
6 have something more than you what you disclosed to them, so if  
7 he forgot something, he better think long and hard and let you  
8 know, because it could come up, if he's asked about his prior  
9 convictions, and the only stuff that he gives up is the stuff  
10 that you give me, and they're going to have to show me what the  
11 good faith basis is for them to ask that question and whether  
12 or not he does have a conviction.

13 (Continued on next page)

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1 MR. ROCHON: Here is my conundrum. With other  
2 witnesses the plaintiffs have objected to us bringing in their  
3 prior convictions by the Israelis.

4 THE COURT: And you may object to this.

5 MR. ROCHON: If they are going to use convictions, I  
6 want to ask him on direct about his convictions. Previously  
7 they have objected.

8 THE COURT: You can ask him about his convictions on  
9 direct if you want.

10 MR. ROCHON: In the past they objected to that. They  
11 are all Israeli convictions. In the past they have objected  
12 because it was injecting an issue that you didn't like.

13 THE COURT: What is the conviction you have disclosed  
14 to them?

15 MR. ROCHON: We sent an e-mail to them last night.

16 THE COURT: Was he convicted of throwing rocks at a  
17 tank or convicted of participating in some violent act?

18 MR. ROCHON: It's not a violent one.

19 THE COURT: Does it go to his credibility?

20 MR. ROCHON: Not in my view. It's protest activity or  
21 illegal organization or something like that.

22 THE COURT: He was convicted of something?

23 MR. ROCHON: Throwing stones, organizing protests.

24 THE COURT: I had it right, convicted of throwing  
25 stones.

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1           So you want to bring out the fact that he was  
2 convicted of throwing stones?

3           MR. ROCHON: Previously the plaintiffs, if I was going  
4 to do that before -- we are all topsy-turvy now. Before they  
5 said I can't do that because that shows the Israelis lock up  
6 guys for a long period of time for dumb stuff. Now, they are  
7 saying they want to use something. All I am saying is if they  
8 are going to use a conviction, I want to bring this thing out.

9           THE COURT: You want them to bring out the fact that  
10 he was convicted of throwing stones?

11          MR. YALOWITZ: I don't have a problem with him  
12 testifying truthfully about what he was convicted of.

13          THE COURT: On his direct examination.

14          MR. YALOWITZ: I don't have a problem with it, as long  
15 as it's truthful.

16          THE COURT: You will have to make a judgment.

17          MR. ROCHON: Then, of course, they will proffer that  
18 it's in the last ten years.

19          MR. YALOWITZ: It's not in the last ten years.

20          THE COURT: I don't know what they are going to  
21 proffer. They haven't told me what it is.

22          MR. ROCHON: I take we are impeaching for credibility  
23 with a prior conviction.

24          THE COURT: I don't know if we are even going to get  
25 do this.

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1 MR. ROCHON: I am just saying they can't even ask him  
2 if it doesn't meet the requirements for prior convictions.

3 THE COURT: If you want to put that in there, Mr.  
4 Rochon, that's fine and dandy, but it's not until he comes up  
5 to me and says, I want to ask him X. And I am going to say,  
6 what was he convicted of and when was he convicted? And what  
7 do you want to ask him and tell me how it goes to his  
8 credibility. If they convince me, and it's particularly  
9 something that he has not disclosed on his direct examination,  
10 or even disclosed to you because you have not disclosed it to  
11 the other side, then I will make a judgment at that point in  
12 time. But otherwise it's much ado about doing.

13 MR. ROCHON: OK.

14 THE COURT: I just want to address some issues now so  
15 we can get them out of the way and then we can adjourn for the  
16 day and we can talk again tomorrow.

17 I am just looking at the letters that I got. I don't  
18 think there are really any more evidentiary issues.

19 MR. YALOWITZ: May I just raise one thing before we  
20 move off this?

21 THE COURT: Yes.

22 MR. YALOWITZ: Because it's going to get late in  
23 Israel and I just want someone to notify Shrenzel to be ready.

24 What time do we hope to get going in the morning? Do  
25 we maybe want to start a little early?

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1 THE COURT: I expect that we should be starting as  
2 early as 10 with the witnesses, and I expect you should be  
3 prepared for your having to put on your rebuttal case as early  
4 as noon.

5 MR. YALOWITZ: I was hoping we might even do it  
6 earlier than that. We will try to have him ready by 10 because  
7 the defendants may decide, based on their gut feeling, that  
8 they don't want to put these witnesses on.

9 THE COURT: You may decide you don't want to put on a  
10 rebuttal.

11 MR. YALOWITZ: So let's try to do it between 10 and  
12 12:30.

13 THE COURT: You have a better feel than I do of what  
14 the direct and cross is going to be.

15 There are some arguments with regard to summations.  
16 We can discuss that tomorrow.

17 Let me just address a couple of things. I will give  
18 you some guidance.

19 You can argue to me whether or not the evidence is  
20 sufficient if you want to be heard further tomorrow when you  
21 rest and we send the jury home, but I don't have in the  
22 abstract a position that they can't attempt to argue that  
23 Abdullah Barghouti was provided to Hamas. If he was the guy in  
24 jail, in their custody, and if they think a reasonable  
25 inference can be drawn by the jury, based on the facts of this

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1 case, that he was released so he could make future bombs and  
2 bombing attacks, and after his release he subsequently was  
3 involved in such activity on behalf of Hamas and Hamas needed a  
4 bomb maker, and he could demonstrate that he was the  
5 perpetrator -- there is not much issue about that with regard  
6 to the Hebrew University bombing -- I think they have the right  
7 to argue that they provided what was an essential material  
8 support, which was the guy who could make a bomb. Since they  
9 did have him in their custody and control, they did not have to  
10 release him to Hamas. If the jury finds they released him to  
11 Hamas so Hamas can use him as a bomb maker, that's a factual  
12 dispute that the lawyers can argue to the jury based on the  
13 evidence.

14 I am not sure I understand the argument with regard  
15 to, quote, terrorism premium or something that amounts to  
16 punitive damages. To the extent I recollect the testimony, the  
17 plaintiff can argue that the plaintiffs suffered and they  
18 suffered injury that should be compensated, and they suffered  
19 greater injury because it was a terrorist attack than they may  
20 have suffered, as they testified, if there had been some other  
21 attack. If the jury gets to that point and they logically feel  
22 that these people suffered greater because it was a terrorist  
23 attack than they would have suffered had it been some other  
24 accident or intentional murder, then I think it's within the  
25 realm of the argument to what extent the jury should assume

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1 from the facts that their injury is compensable in damages in a  
2 greater amount than if it had been an accident or they had been  
3 a victim of some random crime.

4 MR. ROCHON: I understand the court's ruling and the  
5 evidence on it. The argument though may seem like a subtle  
6 distinction, but it's one that we think is important. The  
7 plaintiffs may not argue that the jury should award more to,  
8 quote, teach the defendants a lesson or send a message.

9 THE COURT: I agree.

10 MR. ROCHON: Those kinds of things that you normally  
11 see in punitive cases.

12 THE COURT: To the extent he says it's related to  
13 their assessment of the witnesses and how they testified and  
14 what damages they said they suffered, they did put in evidence  
15 in this case that it was significantly more hurtful that it was  
16 a terrorist attack that these individuals or their relatives  
17 died or were injured by than it would have been a car accident.

18 MR. ROCHON: I understand. Ours is a more limited  
19 point.

20 THE COURT: I think that's the way I would limit it.

21 Let me go to the redactions and get rid of those. The  
22 salah one and salah two should be redacted.

23 The senior official in the Yemenite Army should be  
24 redacted.

25 The deputy commander of the Palestinian Navy should be

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1 redacted.

2 The chairman of the authority, Arafat, should be  
3 redacted.

4 This was all consistent with other redactions that  
5 have been made.

6 I don't have a recollection about the Israeli military  
7 court record of Nasser Shawish. What was the dispute about  
8 that?

9 MR. SATIN: The issue with this one is there was a  
10 trial in this case, and then midway through the trial the  
11 defendant started making statements, incriminating statements.  
12 Based on those in-court statements, he was then convicted.  
13 That was the basis of the conviction. And as a result, the  
14 plaintiffs were allowed to admit into evidence the indictment  
15 for which he was charged and ultimately convicted of.

16 THE COURT: Why are we discussing this issue again  
17 now? Didn't I already rule?

18 MR. SATIN: I don't know if this issue had been  
19 discussed before. Now we have got these proposed redactions  
20 from the plaintiffs and it did not include redactions of the  
21 trial testimony and that trial testimony did not form the basis  
22 of the conviction.

23 THE COURT: You are just objecting to it because you  
24 say it's irrelevant; it's not consistent with the nature of the  
25 redactions you were making before with regard to redacting

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1 names and references to individuals who have been accused by  
2 third parties.

3 MR. SATIN: As far as I know, this is the only  
4 situation we have encountered where there is actual trial  
5 testimony about that issue as opposed to either a verdict from  
6 the court or just a guilty plea and the indictment that  
7 attached to that guilty plea.

8 THE COURT: I think I looked at the references and I  
9 am not sure -- I understand, I think, your grounds for  
10 objection. I just don't understand why you're objecting. What  
11 is it that you think you don't want the jury to hear?

12 MR. SATIN: The questions and answers of witnesses  
13 during that trial.

14 THE COURT: What question and answer? What is the  
15 prejudicial question and answer?

16 MR. SATIN: Part of the concern is it's not clear who  
17 the declarant is, but there is testimony --

18 THE COURT: I thought these were statements by the  
19 defendant. No?

20 MR. SATIN: The part that we are seeking to redact is  
21 not the statement of the defendant, but the statement of  
22 witnesses who testified during the trial. But ultimately the  
23 conviction of the defendant wasn't based on that testimony. It  
24 was based on statements the defendant made mid-trial. In other  
25 words, he decided -- and I think he was unrepresented in the

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1 case -- he decided to start blurting things out in the middle  
2 of the trial. Based on those things he said in the middle of  
3 the trial, the court convicted him, and the indictment as a  
4 result of that was admitted in evidence.

5 THE COURT: Which exhibit are you referencing?

6 MR. SATIN: 382G.

7 THE COURT: 382G is an examination of witnesses.

8 MR. SATIN: Correct.

9 THE COURT: What is it that you wanted to redact?

10 MR. SATIN: The direct examination and  
11 cross-examination.

12 THE COURT: Of who? These are all witnesses who are  
13 not the defendant.

14 MR. SATIN: Correct.

15 Beginning on the third page, which at the bottom it  
16 says 76, you see where it says "defendant," and this is where  
17 the defendant starts making statements, and then again on the  
18 next page.

19 THE COURT: 76?

20 MR. SATIN: Correct.

21 THE COURT: Is this the defendant's statement? Just  
22 the bottom is the defendant's statement.

23 MR. SATIN: We don't believe, according to the court's  
24 rulings, that it would be proper to redact what the defendant  
25 said. That's why we are not seeking that redaction. We are

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1 seeking only the redaction of witnesses who testified during  
2 that trial which did not form the basis of the conviction.

3 THE COURT: So that's defense witness number 3 and  
4 defense witness number 4?

5 MR. SATIN: Correct.

6 THE COURT: That's not part of testimony, 78.

7 MR. SATIN: 78 is what the defendant said.

8 THE COURT: So you're talking about?

9 MR. SATIN: All the testimony on 74, all the testimony  
10 on 75. The testimony on 76 until the last three lines, which  
11 is when the defendant is speaking. Then the testimony on page  
12 77 up until the last four lines where it says defendant.

13 THE COURT: I understand what you're saying.

14 This was a trial, not a plea.

15 MR. SATIN: It was a trial that became a plea.  
16 Because of the statements he made during the trial, it became  
17 effectively a plea.

18 THE COURT: Did he plead guilty? Did he say, I am  
19 guilty of this charge?

20 MR. SATIN: Yes.

21 MR. YALOWITZ: No.

22 MR. SATIN: Depends what you mean he pled guilty.

23 THE COURT: Its common sense meaning.

24 MR. SATIN: If you look at page 77 --

25 THE COURT: Did he enter formally a plea of guilty,

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1 yes or no? Or did he just admit the facts that constituted his  
2 guilt?

3 MR. SATIN: He made all kinds of admissions, and then  
4 prosecutor asked the court to convict him based on those  
5 admissions.

6 THE COURT: So that's not a plea of guilty.

7 MS. ROMEO: If you look at page 80 it says, we convict  
8 the defendant of the crime.

9 THE COURT: It's not a plea of guilty; it is a jury  
10 judgment. Just like parties would come before me and say,  
11 judge, we want to preserve our right to object to the  
12 suppression rules. So we will stipulate that you can convict  
13 my client on this record so we can preserve our right. Because  
14 if we plead guilty we don't preserve that right, but if you  
15 convict us by a bench trial, we preserve that right. If I go  
16 along with that, I look at the record, I convict him based on  
17 the stipulated facts. In this case, he was convicted by the  
18 court.

19 MR. SATIN: The trial didn't finish.

20 THE COURT: He didn't enter a plea of guilty. He was  
21 found guilty, right?

22 MR. SATIN: Based on what he said during the trial.

23 THE COURT: He was found guilty by the court.

24 MR. SATIN: Yes.

25 THE COURT: He did not plead guilty.

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1 MR. SATIN: That is correct.

2 THE COURT: He did not relieve the court of its  
3 independent obligation to find that the facts established his  
4 guilt.

5 MR. SATIN: Correct, based on what he said.

6 THE COURT: That's why they had the witnesses.

7 MR. SATIN: The witnesses preceded what he said.

8 THE COURT: OK. Is there some reason why the  
9 witnesses' testimony is admissible?

10 MS. ROMEO: Well, your Honor, if you look at page 77,  
11 for example, witness number 4 actually talks about knowledge in  
12 connection with the attack involving Mohamed Hashaika.

13 THE COURT: He says he doesn't have a clue who Mohamed  
14 Hashaika is.

15 MS. ROMEO: If you look at page 77 for witness number  
16 4. The first two do say, I only know what I know from the  
17 television. But if you look at 77, he says, I took Mohamed  
18 Hashaika to the checkpoint. Blank took Hashaika to the  
19 checkpoint, introduced him to me, etc.

20 THE COURT: So what is the hearsay exception?

21 MS. ROMEO: In these documents we have only been  
22 redacting the names of --

23 THE COURT: What is the hearsay exception that makes  
24 this admissible for the truth?

25 MS. ROMEO: This is a judgment of conviction.

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1 THE COURT: The transcript isn't a judgment.

2 MS. ROMEO: A self-inculpatory statement.

3 This is what we have been dealing with all along. We  
4 have got statements in these documents, self-inculpatory  
5 statements, where we have been redacting --

6 THE COURT: What is the statement you need?

7 MS. ROMEO: We would like to keep in defense witness  
8 number 4.

9 THE COURT: Why? Because he is saying what?

10 MS. ROMEO: It's Abdel Karim Aweis.

11 THE COURT: Why is that important?

12 MS. ROMEO: He is discussing his involvement, which is  
13 corroborated by his conviction.

14 THE COURT: What does it have to do with the  
15 defendant's involvement?

16 MS. ROMEO: They are saying that he met Hashaika at  
17 the checkpoint.

18 THE COURT: What is he saying about the defendant?  
19 Who is the defendant in this case.

20 MS. ROMEO: This Nasser Shawish.

21 THE COURT: He is not saying anything about Shawish.  
22 Does he reference Shawish?

23 MS. ROMEO: Give me one moment, your Honor.

24 It's a mistake in the redaction. If you look under  
25 witness 4, the question that says, What was my connection with

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1 the terrorist attack carried out by Hashaika? The name is  
2 blacked out but the answer is Nasser. He is saying Nasser  
3 Shawish took Hashaika to the checkpoint.

4 THE COURT: Does Shawish say that?

5 MS. ROMEO: Yes. So it's all corroborated.

6 THE COURT: Why do you need this witness?

7 MS. ROMEO: This document has been in evidence for  
8 weeks. We discussed this document with defendants, and what  
9 was redacted in accordance with those discussions was on page  
10 8. So they are just going back and forth on this.

11 THE COURT: I don't think we ever discussed the  
12 statement by other witnesses during the trial.

13 MS. ROMEO: On that point, if I may just raise it, my  
14 recollection is that back in December, when we first started  
15 talking about these redactions, Mr. Satin made an argument  
16 concerning Shawish's documents. I could go back and check.  
17 This is probably the second or third time this issue has come  
18 up.

19 THE COURT: Did you address it and did I address it?

20 MS. ROMEO: Yes. And I can look back.

21 THE COURT: What did I say?

22 MS. ROMEO: I believe it was in December, that these  
23 statements did not have to come out.

24 THE COURT: I don't have a recollection of discussing  
25 statements that were in the reports that were witness

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1 statements that were not statements of the defendant who pled  
2 guilty or was convicted.

3 MS. ROMEO: I think it was a more general discussion.

4 THE COURT: Quite frankly, this is the first time that  
5 I have a recollection of ever even knowing that what was  
6 included in there was independent testimony of third party  
7 witnesses.

8 MS. ROMEO: We definitely talked about the facts that  
9 there were counts in which Shawish was convicted and not  
10 convicted. The defendants did make an argument that statements  
11 didn't support the conviction should come out, which is exactly  
12 what Mr. Satin is saying right now, because he was convicted on  
13 the basis of his indictment.

14 THE COURT: I agreed with that.

15 MS. ROMEO: Our position is that that statement should  
16 stay in.

17 THE COURT: As I say, I have given you all of the  
18 redacted statements of the witnesses who pled guilty and were  
19 convicted. I think you should take out the statements by  
20 others who, quite frankly, I don't even have a clue as to who  
21 these people are.

22 MS. ROMEO: Does that include --

23 MR. YALOWITZ: Wait a minute. We have gone on and on  
24 and on about these redactions.

25 THE COURT: It's going to stop today. I don't want to

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1 hear any more about redactions. This is it. Take out the  
2 defense witnesses' testimony.

3 MS. ROMEO: Is that including Abdel Karim Aweis?

4 THE COURT: No. If it's a statement by the defendant,  
5 you can leave it in.

6 MS. ROMEO: I understand that. But defense witness  
7 number 4, who is Abdel Karim Aweis, discusses Nasser Shawish,  
8 who is independently convicted and is corroborated.

9 THE COURT: And you have his conviction somewhere  
10 else.

11 MS. ROMEO: It's in evidence.

12 THE COURT: You have the same stuff someplace else,  
13 the same statement by him, right?

14 MS. ROMEO: I would have to double-check the  
15 conviction, but I believe that's the case.

16 THE COURT: We don't need it here as testimony.

17 MS. ROMEO: If there is something we need, we will  
18 come back to you.

19 THE COURT: Take out the things that are referenced to  
20 defense witnesses.

21 I think we already talked about Ahmed's statement.

22 MR. YALOWITZ: I just want to be really clear because  
23 we have had more salami tactics with these redactions than I  
24 have seen in just about anything else in this case. That's it  
25 on redactions?

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1 THE COURT: That's it.

2 MR. YALOWITZ: Done, finished, no more redactions.

3 THE COURT: That's it.

4 MR. YALOWITZ: Can we make sure the defendants  
5 understand that?

6 THE COURT: They speak English.

7 MR. YALOWITZ: I would just like them to say we  
8 understand the ruling.

9 THE COURT: I don't care whether they understand it or  
10 not. That's it. Unless they tell me at this moment there is  
11 something else you guys didn't resolve. I am not going to hear  
12 any more about redactions, unless you guys agree that you made  
13 some inadvertent error and you agree to do something.

14 I am still working on the jury instructions. Let me  
15 just go to two things because I can use some guidance between  
16 now and tomorrow.

17 I am not sure I understand the legal basis for your  
18 objection, Mr. Yalowitz, with regard to respondeat superior,  
19 and, quite frankly, I remember you saying you don't want it in  
20 furtherance of their interest or activities, but I remember we  
21 had a specific discussion and you asked me to take out the  
22 reference to business, commercial or noncommercial. So you  
23 can't have it both ways.

24 It's clear that the law requires that they act in  
25 furtherance of the employer's business activities, commercial

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1 or noncommercial. In this case, it's not business activities.  
2 It's really their interest or the activities that are in  
3 furtherance of the PA's business, particularly to the extent  
4 that you say that it is within the scope of their business, or  
5 their interest as I call it, to do terrorist acts.

6 I am willing to consider, which I don't think is  
7 necessarily helpful to you, but I am willing to consider  
8 putting back in business or putting in activities or putting in  
9 interest. But you cannot convince me, without the employer  
10 acting in furtherance of one of those, that you could establish  
11 liability.

12 In light of your suggestion, I have rewritten the  
13 respondeat superior section, and I have basically went straight  
14 back to the PJI -- not your version of it, not my version of  
15 it -- and I have taken some case law at the end that I think is  
16 appropriate.

17 Now, again, I think it's clear for this jury if I talk  
18 in furtherance of the PA's interest or in furtherance of the  
19 PA's activities rather than their business, but we can discuss  
20 that further. But I think it's important for me to add some  
21 language that I think lets the jury know the distinction  
22 between respondeat superior and any other direct liability.  
23 And I think it's the last paragraph that I have taken out of  
24 the case law, which basically says that it is not sufficient  
25 that the employee was engaged in the employer's service at the

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1 time of the incident giving rise to the action. The test is  
2 whether the employee's act was in furtherance of the employer's  
3 business and was incident to the performance of duties  
4 entrusted to the employee. Where the employee's act was  
5 committed solely for personal end rather than in furtherance of  
6 or incident to the employer's business, the employer will not  
7 be held liable.

8 I think that's the distinction to be drawn between any  
9 direct liability. I don't care how to characterize it to the  
10 jury. I think it is legally accurate to characterize it that  
11 they have to act in the employer's interest, whether that be  
12 business interest or other interest. In this case, I think  
13 it's a little awkward to basically say that the PA --  
14 regardless of what you claim is their activity -- that the PA  
15 is, quote, in the business of terrorism. There is no such  
16 business. There is only those people who are involved in those  
17 kinds of activities or those people who have those kinds of  
18 interests.

19 It seems to me that this is a very narrow -- as a  
20 matter of fact, defense lodged an objection to respondeat  
21 superior. So I think it's a very narrow, legally appropriate  
22 theory, if that's the way you want to go. But it only applies  
23 to those instances where the terrorist bomber or shooter was  
24 acting in the scope of the employer.

25 You can look at this and you can tell me whether you

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1 want me to go back to the way I phrased it, or phrase it in one  
2 of the other ways, but you're not going to avoid "in  
3 furtherance" language. You are going to have to live with some  
4 "in furtherance" language. Otherwise you do not have such a  
5 separate theory.

6 MR. YALOWITZ: I want to read it carefully. I don't  
7 want to just answer on the fly.

8 THE COURT: I took it almost word for word out of the  
9 PJI.

10 MR. YALOWITZ: I read the cases. I know what cases  
11 you're talking about. There are a number of cases that deal  
12 with this personal motives thing. I know those cases. I  
13 haven't looked at them in detail, but I know the concept. I  
14 understand what you are trying to capture with that.

15 Let me just ask you one thing -- two things that I  
16 think will inform my views -- maybe three things on this topic.

17 The first thing is, if we were to stick with the  
18 respondeat superior language that's in your draft of Friday,  
19 but we were to change the word interest to activities, is that  
20 something that you're sort of thinking about or do you want to  
21 add this language anyway? The word interest I get a little  
22 hung up on.

23 THE COURT: I understand that. I don't think in this  
24 case there is really a substantive distinction between that. I  
25 would have to think about it more. I might be able to be

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1 convinced, as I say, one of those three words -- business or  
2 activities or interest.

3 MR. YALOWITZ: I don't have a problem with activities.

4 THE COURT: I think technically it really is supposed  
5 to apply to a situation where they are acting in furtherance of  
6 the employer's business, interest or activities. I think  
7 that's really technically what it is supposed to be.

8 You asked me to take out commercial or noncommercial  
9 business activities. If you want me to stick back to that, I  
10 will think about it. But it seems to me the essence of what I  
11 need to get to the jury is that these employees were engaged in  
12 this activity because they believed it was in the interest of  
13 their employer to do so. I don't see anything sophisticated  
14 about that. You may not prefer that word because it may seem  
15 like it is a somewhat easier test than the others words, but I  
16 don't think it is.

17 MR. YALOWITZ: My problem with the word is it just  
18 pops out. It's not anywhere else.

19 THE COURT: It's supposed to pop out because that's  
20 the critical part. That's the only part you're really fighting  
21 about. That's why I am trying to make it pop out. The jury  
22 decides that issue and they go back home. They don't need to  
23 find whether or not it's an employer or employee, or whether or  
24 not the employee was employed at the time. None of those  
25 things the jury should spend an iota of consideration on.

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1 MR. YALOWITZ: I am not explaining my problem. If you  
2 use the word activities, I don't have a problem, and I will  
3 tell you why. Because you have got a very good, detailed  
4 instruction on what is the scope of employment. That's the  
5 ultimate question for the jury, were they acting within the  
6 scope of their employment? And you go through, it has to be  
7 within the scope of their authority, it has to be in  
8 furtherance of the employer's business, the employer's business  
9 is its regularly conducted activities. That's just a standard  
10 PJI charge. I don't have a problem with any of that.

11 Then there is this kind of old language that lingers  
12 in some of the cases from a long time ago, and sometimes it  
13 carries through, in furtherance of the interest. And I think  
14 that's shorthand for this solely personal motives thing.

15 I am not convinced that the evidence really supports  
16 it. You see that in a sexual harassment case, for example,  
17 where the defendant comes and says, look, how is it possible  
18 that sexual harassment is in furtherance of my business? I  
19 make widgets. And they say, that's purely personal motive.

20 THE COURT: But that's true in this case. That's the  
21 same argument. They are not in the business of terrorism.  
22 They are in the business of governing the West Bank. So that's  
23 not what they were set up for. They make widgets. They make  
24 security and governance for the Palestinian territory. That's  
25 what they are in the business of. They are not supposed to be

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1 in the business of terrorism.

2 MR. YALOWITZ: They are not supposed to be, but they  
3 are.

4 THE COURT: That's not their business activity. So  
5 the analogy you just gave me is spot on. It is not the  
6 standard, oh, well, I'm the UPS driver and I run somebody over  
7 while I was delivering a package. That's respondeat superior.

8 MR. YALOWITZ: Well, if the UPS driver did it on  
9 purpose and they gave him a promotion and a raise --

10 THE COURT: That's a good point. This is not a  
11 negligence case. OK? This is a deliberate, intentional  
12 tortious act. It's not about the UPS driver. You're right, it  
13 would be a different analysis if the UPS driver ran over people  
14 on purpose. Then I wouldn't be saying, well, if the jury  
15 decides that was in furtherance of UPS's business, of course  
16 it's not in furtherance of their business. They are not in the  
17 business of deliberately running over people with a UPS truck.  
18 But if they gave a nod and a wink to the driver and said, the  
19 FedEx president is crossing the street tomorrow, we wouldn't be  
20 unhappy if something happened to him, and then he ran him over  
21 with a UPS truck, then you would say, well, that was clearly in  
22 furtherance of their interest because they wanted this to  
23 happen.

24 That's what I am trying to struggle with here in terms  
25 of being fair to both sides and laying that out for the jury

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1 and give you an opportunity to argue whatever you want to  
2 argue. But you have not convinced me that it is a legally  
3 inappropriate instruction to say that they have to act in  
4 furtherance of the interest because that's even some of the  
5 language that's used in the cases. I don't think I made that  
6 language up.

7 MR. YALOWITZ: You didn't make that language up.

8 Number one, my problem is I have got Judge Friendly  
9 and Judge Calabresi, who -- Judge Friendly and Judge Calabresi,  
10 they are not writing about the law of Guam just because they  
11 think it is important to give guidance on the law of Guam. In  
12 fact, those two cases are in the restatement as the correct  
13 standard of law. And I am sure that when this case goes to the  
14 Second Circuit, and it will, those cases are going to be the  
15 first things they look at.

16 THE COURT: Well, not necessarily, because there is  
17 another case that should be the first case they look at. There  
18 is a more recent case, and I forget which case I looked at --  
19 they even cited it in their letter -- that lays out exactly  
20 what I said. The Second Circuit says exactly what said.

21 MR. YALOWITZ: I guarantee you I know what case Judge  
22 Calabresi is going to be looking at if he is on the panel.

23 THE COURT: As I say, it takes two of them to reverse  
24 one of me.

25 MR. YALOWITZ: I am sure you read those cases. I am

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1 sure you understand my issue of in furtherance of. I don't  
2 have a problem with -- the way you have rewritten it, first, I  
3 want to think about it, and I may give you some refinements.

4 THE COURT: This is my model and you can give me  
5 suggestions.

6 MR. YALOWITZ: Particularly to avoid confusion. But  
7 when I look at that last paragraph, especially just the way you  
8 have written it, I don't think it's inconsistent with the cases  
9 that I have seen, at least looking at it on first blush. So I  
10 don't have a problem with it on first reaction.

11 I do have a concern about that "in furtherance of"  
12 language being in the verdict sheet because I think all of this  
13 goes to scope of employment.

14 THE COURT: The problem I have is that that's the only  
15 thing that's in dispute. If I know for sure that the jury  
16 determined that in your favor, I know that they have resolved  
17 the only genuine factual dispute in this case.

18 MR. YALOWITZ: I am not sure I understand your  
19 thinking on this then. If we went with the new version that we  
20 just started looking at right now --

21 THE COURT: We would have to decide whether or not I  
22 leave in the word "business," or change that word to  
23 "interest," or change that word to "activities," or if there is  
24 some version of business, interest or activities. My  
25 preference is interest. Then I will use that as a model if you

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1 have some other specific issues with regard to this  
2 instruction. But I have literally lifted this out of the PJI  
3 instruction almost word for word that you cited to me in  
4 support of your modified PJI instruction. So I decided to go  
5 back to the newer version of it and add the case law and the  
6 language that I know has been approved.

7 MR. YALOWITZ: We may be down to really short strokes.  
8 Of the three words, I think the one that fits the facts of this  
9 case and is fairest to both sides is activities. If we changed  
10 in furtherance of interest to in furtherance of activities in  
11 the verdict sheet, and we change business activities in the  
12 instructions, or regularly conducted activities -- I think  
13 regularly conducted activities is more consistent with the  
14 pattern instructions -- I think I may not have a problem with  
15 it. I want to reflect on it and look at it, but I may not have  
16 a problem with that. And I don't know if you have a problem  
17 with it. You have to reflect on it too.

18 THE COURT: In the abstract I don't have a serious  
19 problem with it. I am just trying to make sure that I can  
20 focus the jury's attention on what they really need to spend  
21 their time on. I have given it a lot of thought before I put  
22 it in there. I didn't just willy-nilly put it in there. I  
23 think that that best addresses the arguments that both sides  
24 want to argue about.

25 MR. YALOWITZ: I think the language that you came up

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1 with this morning or over the weekend better captures the  
2 concept that we are talking about. I think this paragraph,  
3 subject to it may need some refinement, I think that is a  
4 better instruction than what we had before.

5 THE COURT: One of the reasons why I stayed away from  
6 their business, other than what I have just said, is because  
7 you specifically asked me to take out the reference to  
8 commercial and noncommercial. That was sort of important  
9 because what this case is about, you're right, if it's about  
10 business at all, it's about noncommercial business. It is not  
11 about commercial business. So rather than make them think this  
12 has something to do with a real business, that's not what we  
13 are trying to tell them in this case. As you say, this is more  
14 like the exception that you gave about sexual harassment than  
15 it is about a standard negligence respondeat superior theory.

16 MR. YALOWITZ: Everybody has understood that. My  
17 opening was business as usual, standard operating procedure.

18 THE COURT: I am not wedded to it because I think both  
19 sides can clearly articulate what you say the determinative  
20 facts are supposed to be, and argue consistent with what you  
21 want the jury to determine, and unless you somehow misstate the  
22 law, I think you're probably going to make it clearer than I  
23 exactly what it is you two are fighting about.

24 MR. YALOWITZ: That's the problem. Ultimately the  
25 instructions are from you.

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1 THE COURT: But ultimately the facts are from you. So  
2 that's what is at issue here. I don't think the instructions  
3 are particularly complex. If I had to rewrite these  
4 instructions, I would probably write them in five or six pages.

5 Generally, what is at issue here, they have to figure  
6 out whether or not this is what the PA wanted to happen.  
7 That's basically all it comes down to. There is no more or  
8 less complicated way to analyze it. You tell them what the  
9 facts are that they are supposed to evaluate in terms of  
10 whether or not this is really what they wanted to happen, and  
11 they did something to make it happen, or their employees did it  
12 because they made clear to their employees they wanted it to  
13 happen.

14 Mr. Rochon, did you have something?

15 MR. ROCHON: I share the view that I want to think  
16 about it a little bit further as well. I think the word  
17 activities I might end up concluding is too vague when applying  
18 to government to give the guidance we need. I would like to  
19 think about that a little bit further. As to government, it's  
20 hard to come up with the perfect word. I recognize that. We  
21 know that it's not a commercial business. The jury knows that  
22 as well. So if you use the word business, they are not going  
23 to think we are talking about the PA is selling things. So I  
24 want to think about it a little more.

25 THE COURT: The only other thing I could use some

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1 guidance on now, the verdict form, as we talked about it and  
2 you convinced me on certain issues, I became of the view that  
3 this case is really about either they did this directly under  
4 the theory of respondeat superior of the PA or that they  
5 provided material support. That's why I backed away from it.  
6 It was getting too complicated, and I backed away from, well,  
7 did they themselves commit this offense?

8 Quite frankly, the facts before the jury for the jury  
9 to resolve, they need to resolve whether or not the PA is  
10 responsible because the employees were employees at the time  
11 and did it in furtherance of their business, interests or  
12 activities. To the extent that they don't find that, they just  
13 need to determine whether or not they provided material support  
14 to anybody else or anybody who was committing this offense.

15 I guess one can argue that there is someplace that  
16 technically they can decide that it wasn't respondeat superior  
17 but somehow those people who were bombers or shooters were  
18 still acting as individuals or agents of the PA and/or the PLO.  
19 But if they provided material support to any one of these,  
20 that's a violation of the act, and whether the jury wants to  
21 try to figure out whether we are asking them something  
22 significantly different, in terms of asking them whether there  
23 is a direct participation, I'm not even sure respondeat  
24 superior is particularly useful to them as a theory. Because  
25 if they find that they provided material support for one or all

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1 of these acts, that's it, game over. They don't have to decide  
2 anything else. They could decide on a different theory. They  
3 could decide material support to Al Aqsa and Hamas. As I say,  
4 I have put some of those things in. We have already taken out  
5 funds. And they could find that they harbored somebody. But  
6 it seems to me once they decide the material support question,  
7 they are going straight to damages.

8 So I think those are the two critical questions,  
9 whether they provided material support by providing personnel,  
10 providing their own employees, by assisting others. It doesn't  
11 really matter beyond that whether or not they harbored  
12 somebody. Obviously, if they provided material support, I  
13 don't see how they can't determine they provided material  
14 support for one of these terrorist acts and not determine that  
15 they provided material support to Hamas or Al Aqsa Brigade once  
16 they were designated a terrorist organization to commit those  
17 terrorist acts. They still have to determine independently  
18 whether or not there is sufficient evidence that those entities  
19 were the perpetrators.

20 I guess I can throw back in my questions initially  
21 about whether or not they were responsible for the terrorist  
22 acts because their agents committed the offense.

23 MR. YALOWITZ: That's the only one that I wanted to  
24 kick around a little bit. What you said makes a lot of sense  
25 to me. The issue with agents, quite frankly, is some -- I

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1 mean, employee is an agent so that's one thing. But some of  
2 the people were not agents and some of the entities were not  
3 agents. So there is evidence in the record --

4 THE COURT: I don't know how you can say that, when  
5 you say some of the people are not agents.

6 MR. YALOWITZ: Were agents. Maybe I misspoke.

7 So, for example, there is evidence from which a jury  
8 can conclude that Wafa Idris was an agent of the PA. There is  
9 evidence from which a jury can conclude that Al Aqsa Martyr  
10 Brigades was an agent of the PLO. So that's kind of a useful  
11 way to talk about it to the jury.

12 THE COURT: It depends on where you want them to  
13 concentrate their time. Because you're going to have a much  
14 simpler discussion with regard to material support. You don't  
15 even have to talk about how deeply involved they were. The  
16 only question for the jury is did they provide material  
17 support, as I define that for them. And if they provided  
18 material support, they are in the soup. That's it. They  
19 cannot do that. If they provided material support, they are  
20 responsible for these acts, if they did so. And if you find  
21 that they provided material support, then that's the end of the  
22 discuss. Then all you have to decide is how much you're going  
23 to provide in damages, when you find damages, if the incident  
24 that you say that they provided material support for caused  
25 those damages.

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1           It doesn't matter whether they provided 100 percent of  
2     the support or they provided 1 percent of the support. If they  
3     provided material support, then they are responsible for these  
4     attacks. And if you find that they did not provide material  
5     support, that these people were off doing this on their own,  
6     and they did nothing to knowingly assist -- I shouldn't use the  
7     word assist -- but knowingly further the accomplishment of  
8     these terrorist acts, then that's the end of the discussion and  
9     you go home.

10           You just have to figure out how you want to spend your  
11    time because these are the arguments that the two of you are  
12    going to have to make. Probably more so for the plaintiff than  
13    the defendant. If you want to spend your time making an  
14    argument and explaining to the jury why they have to decide  
15    whether there was respondeat superior, whether there was  
16    material support, whether they independently committed the  
17    offense, and whether they harbored or supported Hamas --

18           MR. YALOWITZ: We plaintiffs, we like lots of options.

19           THE COURT: Options are good.

20           MR. YALOWITZ: At some point you have to give up  
21    optionality.

22           THE COURT: The jurors sat through weeks and weeks of  
23    testimony. It's your job to make it simple for them if you  
24    want a verdict in your favor. They try to make us think when  
25    we get to law school to take something simple and make it

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1 complicated. It's just the opposite, particularly as a trial  
2 lawyer. It's your time to make this simple for them and say,  
3 look, we are not fighting about 85 percent of the facts here.  
4 We know who the players are. We know who the bombers are. We  
5 know who is in charge, who is supposed to be in charge. If the  
6 PA or the PLO decided that they wanted this to take place, they  
7 provided material support so it can take place.

8 MR. YALOWITZ: I want to think about it and finalize  
9 my views.

10 THE COURT: I can very quickly put them back in. But  
11 as you can see, this verdict form as of now is 21 pages. I  
12 think it was like 45 pages when I threw in a direct liability  
13 question as to the PA and then another separate liability  
14 question as to the PLO with regard to every single incident.

15 MR. YALOWITZ: I think we are down to a narrow set of  
16 questions here. Let reflect on it.

17 The only thing on the verdict form that I see right  
18 now that I really know I want a change on is that word  
19 interests. Like I said, I don't have a problem with  
20 activities, especially given that last paragraph in the new  
21 instructions.

22 THE COURT: I think you suggested that I change the  
23 order back.

24 MR. YALOWITZ: I want to think about that more.

25 THE COURT: It depends on whether we throw back in an

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1 independent question of liability as to each defendant. The  
2 reason I did this is because, if they decide the material  
3 support question, then the others get to be a lot easier. Not  
4 necessarily determinative on every single thing. They can  
5 still find that they provided material support, but they didn't  
6 harbor.

7 MR. YALOWITZ: Why don't we leave it in the order that  
8 you have got it, unless I come back and say, no, no, I really  
9 want you to change it.

10 THE COURT: Also, I think it's more consistent with  
11 the separate determinations that have to be made by the jury  
12 with regard to the PA and the PLO. I have technically put it  
13 in the order in which it is in the caption. As a matter of  
14 fact, on the last one I had reversed the caption. But I put it  
15 in the order that's in the caption so they should decide  
16 whether the PLO provided material support, and then they should  
17 decide whether the PA provided material support, and then they  
18 should decide whether an employee of the PA in fact carried out  
19 the act, and then there is the PA and the PLO questions with  
20 regard to harboring, and there is the PA and the PLO  
21 questioning with regard to providing material support to a  
22 foreign terrorist organization.

23 Quite frankly, the easiest determination -- not the  
24 easiest, but the consistent determination will be pretty much,  
25 if they find material support with regard to the PA or the PLO,

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1 they are clearly likely to find that they provided material  
2 support to the foreign terrorist organization.

3 MR. YALOWITZ: The only other thing I wanted to  
4 cover --

5 MR. ROCHON: If we are going to leave this one, I can  
6 wait until the end if that is easier for Mr. Yalowitz.

7 MR. YALOWITZ: It would be easier if you waited.

8 The other thing I wanted to cover, the other thing I  
9 put in my letter is that sort of intro to the antiterrorism act  
10 where we talk about -- I don't remember the exact wording, but  
11 the violent attacks.

12 (Continued on next page)

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1 THE COURT: I don't have a strong position on that. I  
2 might go your way on that one. I want to think about it a  
3 little bit. It's just a question of clarity, as far as I'm  
4 concerned. I just want to be consistent. You want me to say  
5 act of international terrorism?

6 MR. YALOWITZ: Yeah.

7 THE COURT: I don't have a problem with that. I don't  
8 know why the defendants would have a problem with that.

9 MR. YALOWITZ: I just don't want there to be something  
10 that is misused in closing, that's my concern.

11 THE COURT: As I said, I don't have a strong opinion  
12 about that, and I'm probably willing to give you that. And  
13 there was something else that you suggested changing. I made  
14 the change that you asked me to separate the knowing from the  
15 first element. You asked me to separate that, and I did.

16 And I'm probably going to move up -- I did make a  
17 change over the weekend, I will move up the respondeat superior  
18 and the agency language even further. I'm not totally  
19 comfortable where it is, but I know it should be closer to the  
20 elements, and I think I have it after the injury sort of  
21 transition section into damages. And I don't think it should  
22 be in between those two, I'm talking about moving page 51, the  
23 instruction on 51 and through 57 to before 49, where 49 starts  
24 talking about injury, more related to liability than injury,  
25 and I would move it up at least in front of that, if not

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1 further than that.

2 MR. YALOWITZ: I think Sand puts it even earlier, but  
3 it's so discretionary.

4 THE COURT: The problem is I don't want to separate --  
5 I'm trying to struggle with separating the different -- the  
6 harboring and the material support and providing material  
7 support to a terrorist organization. I wanted to keep all of  
8 those in a group. So I couldn't find a convenient place to  
9 stick this in between that, maybe I could stick it in between  
10 before I get to the harboring and the other sections, if I will  
11 just deal right after I get the basic elements or put it right  
12 back where it originally was right up front. But up front, I  
13 didn't think it was as useful until I knew what the elements  
14 were.

15 MR. YALOWITZ: I think it's a classical problem, and I  
16 think that's why they solved it by putting it up front, because  
17 they don't want it to break up the elements. But I think  
18 they'll get the picture wherever you put it.

19 THE COURT: I will take the suggestion and talk about  
20 it more tomorrow.

21 Mr. Rochon?

22 MR. ROCHON: I anticipate from your conversation that  
23 you're likely to send around a new draft here fairly soon. Am  
24 I right or wrong?

25 THE COURT: Yeah, I might not be able to get it to you

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1 before the morning, but I still have this other afternoon  
2 commitment. And I don't know if I'm going to be where I want  
3 to be, but by tomorrow morning, before you rest you will  
4 definitely have it, and hopefully by the time we start in the  
5 morning.

6 MR. ROCHON: The part where -- the colloquy about the  
7 verdict form is helpful.

8 And on the agency issue, when I look at the evidence,  
9 it's hard to envision any scenario in which the jury would be  
10 saying no on material support and yet reach --

11 THE COURT: Right.

12 MR. ROCHON: So it has the capacity to confuse. I  
13 don't know the Court's tentative views.

14 THE COURT: My tentative view is I took it out. I  
15 took it out because I thought as long as they decided material  
16 support, that's a more direct analysis for them, and that's --  
17 who cares whether they had -- whether they independently did it  
18 on their own. It doesn't matter. If they provided material  
19 support then they're responsible.

20 And so my view was to take out and to simplify it.  
21 I'm not sure that I am of the view that the plaintiff is  
22 entitled to it if they really wanted to do that, but I didn't  
23 see the advantage to either the plaintiff or the defendant to  
24 do that particularly.

25 I also have in mind -- I know a little bit about

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1 jurors and how they use the verdict forms and how it guides  
2 them in terms of what they focus on. And that was one of the  
3 reasons why I put the order this way, because I wanted to focus  
4 their attention and look and figure out if they provided  
5 material support. Because if they did, then that will guide a  
6 quicker discussion with regard to that. If they started out  
7 with the employer liability, I think that's a too limited an  
8 analysis for them to spend the first hours or days discussing  
9 with regard to whether or not they're confident that support  
10 was provided.

11 We can debate about the semantics of whether aiding  
12 and abetting. Obviously providing material support is a  
13 different analysis than simply being the person who sent out  
14 their minions to blow themselves up or shoot people, and I put  
15 it that way to focus the jury.

16 I need, Mr. Yalowitz -- I guess both sides, make sure  
17 I have all the plaintiffs correct and all the plaintiffs are  
18 still in the case. That was my best analysis, judgment. Both  
19 sides should look at that if I have left anybody out or didn't  
20 put anybody in.

21 MR. YALOWITZ: We'll double-check. I didn't --  
22 nothing jumped out at me that somebody was missing or that  
23 someone should have been dismissed out on the summary judgment  
24 wasn't. I don't mean legally, I mean logistically, I'm not  
25 conceding that summary judgment.

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1 THE COURT: I understand.

2 Mr. Rochon, you should let me know if you want  
3 really -- if you have what would be basically an obvious  
4 argument to make that I should eliminate some theory out of  
5 this case that goes to the jury. Otherwise, my inclination at  
6 this point is to let the jury handle this first and then  
7 determine whether or not -- unless I think there's some  
8 significant prejudice to you given the case, I want to see what  
9 they have to say about these claims first, unless there's some  
10 clear legally insufficient claim that I should take away from  
11 that. Then I can reevaluate, if they don't rule in your favor  
12 on that issue, whether it's supported by the evidence.

13 Because part of the problem in a trial like this, you  
14 should have an opportunity and I should have an opportunity to  
15 go back to the transcript and make sure that we, as you say,  
16 what we think is there is really there and/or and make a  
17 determination. So I am willing to hear you tomorrow. What I  
18 would anticipate is that we send the jury home early tomorrow  
19 and have final discussions and sum up on Thursday.

20 MR. YALOWITZ: The only problem I have with that --  
21 and look, this is really up to you, the problem I have with  
22 that is this we have several plaintiffs in anticipation of  
23 Wednesday summations are on their way back to New York and  
24 would like to hear the summations on Wednesday. If we can get  
25 to them, I understand we've got -- we may not be able to.

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1           If we go until Thursday it's a problem getting these  
2 particular individuals back to Israel on Thursday night because  
3 by the time they fly and land it's too late for them to get  
4 home to observe the Sabbath. So that means we have to keep  
5 them in New York several days.

6           Look, at the end of -- we may not be able to get to  
7 summations on Wednesday. If we can't, we're in your hands on  
8 that, but it would be very helpful to these -- it's four of  
9 them, it's not everybody, it's four of them.

10          THE COURT: Well, that begs the question. Let me ask  
11 at this point, at this time, Mr. Rochon, approximately how long  
12 do you anticipate your summation?

13          MR. ROCHON: I would say 90 minutes.

14          THE COURT: Mr. Yalowitz?

15          MR. YALOWITZ: Seven hours. But I'm going to cut it  
16 down between now and then.

17          THE COURT: Can you give me a more specific estimate?

18          MR. YALOWITZ: Look, I think I'm likely to go two  
19 hours. I think that's likely. I'm over that right now, and I  
20 know I need to cut it down, but that's kind of where I'm  
21 thinking.

22          THE COURT: Mr. Rochon, did you want -- if possible,  
23 did you want to start tomorrow afternoon?

24          MR. ROCHON: Here's what I was thinking, I think we  
25 have some things to address, including some things on the Rule

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1 50 we would like to talk to you about tomorrow, and getting the  
2 instructions and knowing them is helpful to have that the day  
3 before.

4 THE COURT: Well, you pretty much got in essence.

5 MR. ROCHON: This agency stuff, and I heard you on the  
6 verdict form, but on the instructions I understand the Court --  
7 I don't understand the Court is also taking out the  
8 instructions or would instruct agency but not have it on the  
9 verdict form.

10 THE COURT: I think it's appropriate to instruct on  
11 agency with regard to material support.

12 MR. ROCHON: We want to discuss that with you, of  
13 course.

14 THE COURT: We can discuss that further, but the  
15 problem I have with that argument is that specifically the  
16 instruction I give the jury is that this kind of entity can  
17 only act through its agents. It can only act through other  
18 entities or human beings, but more likely human beings.

19 And so the PA is not a person. It doesn't have legs  
20 and arms, it can't physically do anything. People have to do  
21 it as its agents. That's the only context in which I think  
22 agency is particularly relevant in this case is that an entity  
23 can only act through its agents.

24 So I think they need to know -- and for the benefit of  
25 both sides, they need to know if you need to find a person who

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1 is of high responsibility so that they, just like any corporate  
2 circumstance, they are considered a managerial person or can be  
3 an employee that you're directing.

4 But the real responsibility for most of this in terms  
5 of providing material support would be to the extent that a  
6 high-level individual is not themselves giving directions, or  
7 as they say Arafat is not directly giving money or support or  
8 whatever other resources to do a terrorist act, that to the  
9 extent that he gave that responsibility to others, they are the  
10 agents of the PA and the PLO. And if they demonstrate that  
11 they were acting with that given authority, just similar but a  
12 little different, a lot different than respondeat superior, if  
13 they are given that authority and they act at the behest,  
14 direction, command or encouragement of a responsible PA or PLO  
15 official, they go out and to those acts as their agents, and  
16 the PLO or PA can't say well, Arafat didn't strap a bomb to  
17 himself, or Arafat didn't drive unlawful interests to cross the  
18 border, or an employee of the PA didn't do that, as long as  
19 they establish that somebody, that you got to do that on your  
20 behalf because that's what you wanted to happen, then they are  
21 your agent for the acts that they do to accomplish that.

22 MR. ROCHON: So I think on that one it will be helpful  
23 to continue to discuss, because obviously employees are sort of  
24 easy to figure out. And the question is -- and what I think  
25 the defense ought to be entitled to here, if we don't prevail

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1 on not giving the instruction, is to give a clear understanding  
2 of who the plaintiffs contend are agents on these facts.  
3 Because we're going to have argument -- I'm going first, and I  
4 do need to know their theories before I argue.

5 So I would like to discuss the -- because our view on  
6 these facts, it's really hard to see the agency argument as  
7 separated from the direct support to one of AMB or whatever or  
8 the respondeat superior argument, and we want clarity on what  
9 this instruction would allow the plaintiffs to argue,  
10 particularly since I won't be arguing after Mr. Yalowitz but  
11 before. But in any event, I want to know this.

12 THE COURT: I think your first guidance, unless  
13 Mr. Yalowitz wants to give you greater guidance, is anybody  
14 that the evidence indicates that was either instructed or  
15 directed or requested to commit this terrorist act or to do  
16 something which would be necessary to facilitate this terrorist  
17 act.

18 This person -- to the extent the jury should find this  
19 person was given that direction by a high level responsible PA  
20 person, or they could infer that that was who they got those  
21 directions from, that person, in acting to facilitate that  
22 terrorist act, could constitute an agent of the PLO. I can't  
23 tell you as to each one of these six ones who the one to ten  
24 people that they claim fit that category, but --

25 MR. ROCHON: It's such a vague sort of instruction how

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1 in this case one would sort of parse out how one would argue  
2 where you don't have the traditional agency relationships.

3 THE COURT: I don't think this is an unusual -- I  
4 think it is a traditional agency relationship. I think  
5 agents -- I don't think -- you seem to want to make something  
6 more sophisticated than it is. If I asked to you go to  
7 McDonald's and get me a Big Mac, you're my agent. There's  
8 nothing sophisticated about that. This has nothing to do with  
9 the PA structure.

10 MR. ROCHON: I'm responsible for your cholesterol.

11 THE COURT: But I didn't see -- in reading through  
12 your suggestion, I didn't see any real argument that the law  
13 that I stated on agency is incorrect.

14 MR. ROCHON: The question is whether the facts justify  
15 giving the instruction is much more than whether, as stated, it  
16 would be right. The question would be on these facts whether  
17 all of that law would be appropriate.

18 THE COURT: But you didn't identify for me which ones  
19 would not be appropriate.

20 MR. ROCHON: I'm still a little vague. It may seem  
21 obvious for everyone else. I know the plaintiffs referenced  
22 Wafa Idris would be deemed an agent of the PA or PLO. I'm not  
23 sure the facts would support being an agent of the PLO or even  
24 the PA because their evidence is that she got the bomb at the  
25 Mukataa. So the question is can that instruction -- that if

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1 that theory isn't applicable in that incident, I want to know,  
2 because I got to know what I'm fighting. I can't shadow box in  
3 the dark.

4 THE COURT: Let's put it this way. Mr. Yalowitz is a  
5 nice guy, but frankly, I don't have a lot of confidence that he  
6 will be nice enough to tell you exactly what he will argue.  
7 But you know what the record shows. The record shows that  
8 there's a possible argument or there isn't a possible argument.  
9 It shows who the people are who the jury can determine were  
10 involved and who weren't the people involved. It shows that  
11 they had some connection with the PA or the PLO or they didn't  
12 have connection with the PA or the PLO. If he wants to be more  
13 specific for you, fine, then he should do so, but --

14 MR. ROCHON: Maybe we should assume for just this  
15 conversation that he decides not to be more specific.

16 THE COURT: That was my basic premise.

17 MR. ROCHON: That was the choice he made.

18 THE COURT: What do you want me to force him to do,  
19 tell you exactly everybody he's going to say is an agent?

20 MR. ROCHON: Well, I think --

21 THE COURT: I'm not sure you're entitled to this.

22 MR. ROCHON: I think we are entitled to know who they  
23 argue who is going to be an agent of our clients.

24 THE COURT: They're going to argue whatever they think  
25 the facts support.

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1 MR. ROCHON: Yeah, but I mean presumably they won't  
2 argue people that facts don't support would be their position.

3 THE COURT: If they do, I'm sure you will --

4 MR. ROCHON: This all started as to when we ought to  
5 close. That's how we get on this track. And I think it would  
6 be beneficial to have some argument on the Rule 50 tomorrow to  
7 get clarity on this. I do think it would be beneficial to work  
8 through the witnesses, work through the instructions, work  
9 throughout verdict form, have those arguments and close the  
10 next day, even if somebody does need to stay here or beyond  
11 10:00 p.m. There's a 10 o'clock flight to Tel Aviv out of New  
12 York. I've been on it more times than I would like to admit  
13 over the course of the last seven years, 50 or 60 times.

14 MR. YALOWITZ: They can't take a flight like that.  
15 The problem is --

16 THE COURT: You're not being heard by me or the court  
17 reporter. The reality is -- I don't want to spend the time  
18 because I don't need to debate that. The reality is I  
19 structured it as best I can. I am not going to force  
20 Mr. Rochon -- if you want to sum up first, maybe I will  
21 consider it.

22 MR. YALOWITZ: Open and close and then a final --

23 THE COURT: Short rebuttal. If you want to consider  
24 that, I will consider doing that. But I'm not going to put the  
25 burden on Mr. Rochon so he has to scramble to accommodate your

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1 plaintiffs that he has to close tomorrow. Now if he wants to  
2 do that, he can. If you want to do that, you can.

3 But otherwise, I can't control the weather, I  
4 expect -- look, I was in a situation where I was calling jurors  
5 between 8:30 and 9 o'clock who were on their way, somebody  
6 already arrived here, to tell them they should stay home. I  
7 will do the best I can. If you want to talk to Mr. Rochon to  
8 see if you can work that out, or if you want to open first and  
9 Mr. Rochon can open after you and I will give you short  
10 rebuttal, you can consider that. But I don't think I'm in a  
11 position to force him to open for your convenience.

12 MR. YALOWITZ: I understand that. Look, I had one  
13 other thing I want to raise with the Court, but I was hoping we  
14 might take a short break.

15 THE COURT: Well, I want to wind up.

16 MR. YALOWITZ: So let me quickly say the final thing  
17 on my mind, which is reflecting on that final paragraph on  
18 respondeat superior, there are New York cases that say -- I  
19 don't think there's any dispute this is the law -- where an  
20 employee is traveling on company business and personal  
21 business, that doesn't alleviate the company of liability. We  
22 may want to just add something like that for clarity. I don't  
23 have language in mind.

24 THE COURT: Think about it. If you have some language  
25 that you suggest -- I thought about this in a lot of different

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1 ways, I can't think of anything particularly applicable here  
2 that the jury needs legal instructions on, but you want to  
3 fashion something, propose something to me, be prepared with it  
4 tonight or tomorrow morning, and we'll discuss it. I want to  
5 make sure that we could be ready to begin summations as early  
6 as Thursday.

7 MR. YALOWITZ: Or possibly tomorrow. I might come in  
8 in the morning and say look, let's get to it, let's get the  
9 jury going. And the defendants may not agree, they may want to  
10 go first because they want primacy.

11 THE COURT: You can work that out tonight or this  
12 afternoon. Talk about it and see if that is really that  
13 important to your clients.

14 MR. YALOWITZ: We'll try to figure that out, but I'm  
15 sure whatever we want they will agree with anyway.

16 THE COURT: Okay. So let me go back and do some work  
17 before I leave this afternoon and do some more tonight, and  
18 then we'll be ready to wind up the witnesses tomorrow and  
19 address all the issues again and be ready to go tomorrow  
20 afternoon or Wednesday -- I mean Thursday morning.

21 If you are correct about your summations, I anticipate  
22 an hour or two from the defense and two to three hours from the  
23 plaintiff. Did I get that wrong? Then we might be in a  
24 position to hopefully -- at that rate we'll be in a position to  
25 charge the jury and send them in to start their deliberations

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1 on the same day.

2 Go to work, and I will see you tomorrow morning.

3 Let's start at 9:15 so we can make sure we're all set to go.

4 MR. YALOWITZ: For planning purposes, if the  
5 defendants have decided that they're definitely calling or not  
6 calling any of the witnesses, then that would be useful  
7 information.

8 THE COURT: Hopefully they can provide that  
9 information as quickly as they're able to determine.

10 MR. ROCHON: Thank you, your Honor.

11 (Adjourned to February 18, 2015 at 9:15 a.m.)  
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